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"Human Rights Arguments in Investor-State Arbitration"

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INTRODUCTION

The interrelationship between international investment law and international human rights law has attracted widespread attention in the last two decades.[1] While arbitration institutions have been experiencing a rapid increase in their caseload, given that investor-state arbitration has emerged as the most effective and popular means to settle investment disputes, the spotlight has been directed to the interactions between the international investment law and the host States' non-investment obligations to protect the human rights of all individuals living on their territory, including foreign investors.[2] In this context, human rights arguments have appeared in investor-state arbitration. Human rights arguments have been raised by the investors, by the host States and by non-party actors alike, and although they were "sparse and infrequent" at the beginning, they are appearing with increased frequency, especially in most recent cases.[3]

Indeed, two of the most popular investment cases in 2016 have been the *Al Jazeera v. Egypt* and the *Philip Morris v. Uruguay* case; the one as the first ICSID case of 2016 and yet pending, the later for the landmark award issued.[4] Both cases have raised significant human rights issues to be addressed by the investment arbitral tribunals. On the one hand, *Al Jazeera*'s claims relate to unlawful criminal proceedings and persecution of its journalists and attacks at the facilities of the media network by the Egyptian military, police and gangs acting in the interests of the military government. On the other hand, the case of *Philip Morris v. Uruguay* concerned investors' claims of investment treaty violations by the governmental tobacco control measures aimed to protect the right to health. These cases, discussed later in

[1] See Dupuy, P., Francioni, F., & Petersmann, E. (2009). *Human rights in international investment law and arbitration* (International economic law series). Oxford: Oxford University Press.

[2] Hirsch, M. (2009). Investment Tribunals and Human Rights: Divergent Paths, In: Dupuy, P., Francioni, F. and Petersmann, E.-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 97–114, at p. 97.

[3] Reiner, C. and Schreuer, C. (2009). Human Rights and International Investment Arbitration. In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 82-96, at p. 82; Petersmann, E. (2009). International Rule of Law and Constitutional Justice in International Investment Law and Arbitration. *Indiana Journal of Global Legal Studies,16*(2), 513-533, at p. 524; Karamanian, S. L. (2013). The place of human rights in investor-state arbitration. *Lewis & Clark Law Review, 17*(2), 423-447, at p. 423.

[4] See details for the pending *Al Jazeera v. Egypt* case in Investment Policy Hub of United Nations Conference on Trade and Development (UNCTAD) website at: http://investmentpolicyhub.unctad.org/ISDS/Details/700; Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay).

detail, illustrate clearly why human rights arguments become relevant in investor-state arbitration, either in the context of the protection of investors' rights or in the context of the host States' obligations to protect the human rights of their people.

The present study aims to investigate and illustrate, though a case law analysis approach, the course of development of human rights arguments in investor-state arbitration, over the last decade. Namely, it deals with human rights arguments - inspired by or derived from international human rights law - which both the investors and the host States have raised during investment arbitration proceedings. Furthermore, it recognizes the significance of the *amicus curiae* submissions and it presents the *amici*'s human rights arguments, raised mainly in support of the host State defense. This paper aims at a critical appraisal of the human rights arguments raised in investor-state arbitration through the analysis of investor-state arbitration awards and interim decisions, parties' memorials and amicus curiae briefs, (focusing on the relevant facts, the parties' and non parties' positions and the relevant tribunal's analysis); it explores the different issues that evolve and provides further considerations.

Moreover, this study attempts to look into the most recent cases in investor-state arbitration related to human rights issues and highlight the qualitative differences in human rights argumentation provided by the parties and in tribunals' relevant positions and analysis, compared to earlier cases. To this end, recent awards and interim decisions that have not been commented yet by scholars are among the case studies presented. While, it has been supported that investors and host States only rarely invoke human rights in investor-state arbitration and that arbitral tribunals remain reluctant to examine human rights arguments raised by the parties or in amicus curiae submissions- something that is evident in earlier cases presented in the present paper, part of the recent cases examined represent a departure from this trend.[5]

This study aims to give answers, *inter alia*, to the following questions: Which are the principal avenues that have been used by the parties and the tribunals for inserting human rights arguments in investor-state arbitration? Is there any evidence to suggest a change in the frequency and the quality of human rights arguments raised in investor-state arbitration? What makes a strong human rights argument?

Specifically, this study has given special attention to the human rights arguments made by the investors, dedicating a substantial part of it to an issue on which little concern

[5] Petersmann, 2009, supra note 3, at p. 524 and Cotula, L. (2016). Human Rights and Investor Obligations in Investor-State Arbitration: Hesham Talaat M. Al-Warraq v The Republic of Indonesia, UNCITRAL Arbitration, Final Award, 15 December 2014 (Bernardo M. Cremades, Michael Hwang, Fali S. Nariman). *The Journal of World Investment & Trade*, *17*(1), 148-157, at p. 148.

has been focused. Apart from some recent academic articles that discuss a specific case, the existing literature has dedicated no more than two pages in cases, where the investor raised human rights arguments, providing no further considerations on this issue.[6] Instead, there is substantial literature commenting on the commonalities between foreign investors' rights under the IIAs and human rights.

Brower argued that international investment treaties can be described as "the functional equivalent of human rights treaties designed to protect foreign investors from serious abuse by host states".[7] Dupuy observed that "the international protection of foreign investments clearly preceded the recognition at the interntional level of fundamental human rights".[8] A series of minimum standards of protection, including procedural and substantial rules, were consolidated in the context of the development of industrial revolution and States' exercise of diplomatic protection, to protect foreign investors from mistreatment by the host states.[9] The prevailing idea behind diplomatic protection was that of "vulnerable" to host States' interference foreigners, making it reasonable to offer them an extra means for protection against the violation of their human rights. Respectively, under the international investment regime, foreign investors are being considered vulnerable to States' regulations interfering with their investments, and thus it is considered reasonable to offer them an extra means for protection against their violation of their rights.[10] In this regard, scholars have reasoned that modern international human rights law arose out of the obligations imposed on host States for the benefit of foreign investors. Recognizing, therefore, that protections granted to investors under international investment agreements "echo human rights" and "mimic human rights provisions", as the FET and FPS guarantees under the IIAs "require levels of observation and vigilance that fairly resemble the duty of a State to protect human

[6] See Henin, P. (2013). Jurisdiction of investment treaty tribunals over investors' human rights claims: The case against Roussalis v. Romania. *Columbia Journal of Transnational Law, 51*(1), 224-271 and Cotula, L. (2016). Human Rights and Investor Obligations in Investor-State Arbitration: Hesham Talaat M. Al-Warraq v The Republic of Indonesia, UNCITRAL Arbitration, Final Award, 15 December 2014 (Bernardo M. Cremades, Michael Hwang, Fali S. Nariman). *The Journal of World Investment & Trade, 17*(1), 148-157.

[7] Brower II, Charles H. (2011). *Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties*, 9 SANTA CLARA Journal of International Law. 179-214, at p. 181.

[8] Dupuy P. (2009). Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law. In: Dupuy, P., Francioni, F., & Petersmann, E. (eds). *Human rights in international investment law and arbitration* (International economic law series). Oxford: Oxford University Press, pp. 45-62.

[9] Ibid.

[10] Vermeer-K*ü*nzli, A.M.H. (2007). *The Protection of Individuals by means of diplomatic protection: Diplomatic Protection as a Human Rights Instrument*. Doctoral Thesis, Department of Public International Law, Faculty of Law, Leiden University, at pp. 14-15.

rights", the question that arises is "Why investors need to resort further to IHRL to support their claims?".[11] The present study, through the presentation of human rights arguments raised by the investors, explores how the content of these IIAs' standards can be informed by international human rights law.

On the other hand, a significant part of literature has focused on the human rights of the host State population and the relevant human rights arguments raised by the host States, in defense of challenged governmental measures, and in *amicus curiae* submissions. In fact, the investment disputes cover a wide range of investment activities (such as water and sewage services, mining exploration and exploitation, hazardous waste management, gas and oil production, etc) that can affect the enjoyment of human rights of the host State population.[12] International human rights law imposes obligations upon the host States: States have an obligation to respect, protect and fulfill human rights of their population in all contexts, thus also with regard to the negative effects of foreign investment and against investors' rights.[13] However, the IIAs have been portrayed by commentators and advocacy groups as dangerous tools that empower foreign corporations to avoid regulation, leading to a "regulatory chill" against the protection of host State peoples' rights.[14] Cotula, looking into the protection of property under IHRL and IIL, observed that IIAs may often grant to investors stronger property protection than that available to the host State population.[15] In parallel, scholars have witnessed an increase in international investment disputes, "where claims and considerations relating to environmental rights, sustainable development and foreign investment protections are inextricably intertwined".[16] This study, acknowledging the issues and the concerns raised in existing literature, focuses specifically on cases that serve its purpose, being indicative of

[11] Alvarez, J.E (1997). Critical Theory and the North American Free Trade Agreement's Chapter Eleven, 28 Univ. Miami Int-Am L. Rev. 303, at 307-8, as cited in Isiksel (2016). The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights. *Human Rights Quarterly*, *38*(2), 294-349, at p. 311.

[12] Kriebaum, U. (2009). Human Rights of the Population of the Host State in International Investment Arbitration. *The Journal of World Investment & Trade*, *10*(5), Vii-677, at p. 653.

[13] Id., at p. 655.

[14] Brower II, Charles H. (2011). *Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties*, 9 SANTA CLARA Journal of International Law. 179-214, at p. 181.

[15] Cotula, L. (2015) 'Property in a shrinking planet: fault lines in international human rights and investment law', *International Journal of Law in Context*, 11(2), pp. 113–134. doi: 10.1017/S1744552315000026, at p. 131.

[16] Pavoni R. (2009). Environmental Rights, Sustainabel Development, and Investor-State Case Law: A Critical Appraisal. In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 525-556, at p. 525.

the development of human rights arguments raised by the host States and by amici, and of the different avenues through which these arguments can insert in investor-state arbitration.

At this point, a determination of the way that this paper conceptualizes the term "human rights arguments" is considered necessary. This paper adopts a broad concept of "human rights arguments". Human rights arguments, therefore, are presented and analyzed as raised by the parties in investor-state arbitration, in both cases: a) when the parties explicitly refer to "human rights" and b) when the parties refer to human rights in an implicit way. Moreover, "human rights arguments" include such human rights arguments based, *inter alia*, on international human rights law, international environmental law, international conventions that encompass human rights issues and on host State domestic law. Yet, the present paper is not concerned with human rights arguments that could arise under international humanitarian law.

More specifically, for the purposes of this paper, "human rights arguments" include environmental arguments. It is the position of this paper that human rights and environmental protection are concepts interrelated, interdependent and inextricably linked, as both of them intend to the well being of humanity. Indeed, a safe, clean, healthy and sustainable environment is a precondition for the enjoyment of a wide range of human rights. At the same time, the human right framework is an effective means to the end of environmental protection. The close linkages between the enjoyment of human rights and the protection of the environment have been recognized in various international and regional instruments, in resolutions of the UN bodies, in national constitutions, in the outcome documents of academic and policy international conferences and in tribunals' decisions.[17] Scholars have dealt with the relationship between environmental protection and human rights or the human rights dimension of environmental law.[18] For instance, Pavoni stresses the broad division of

[17] See UN Human Rights Council (23 March 2016). Resolution adopted by the Human Rights Council on 23 March 2016 31/8. Human rights and the environment. A/HRC/RES/31/8. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=199; UN Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Human Rights Office of the High Commisioner. New York and Geneva, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; United Nations Environment Programme (UNEP) (2014). *Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases*. UNEP and CIEL. Available at: http://www.unep.org/delc/Portals/119/publications/UNEP-compendium-human-rights-2014.pdf; Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972), available at: http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503

[18] See Anton, D.K. and Shelton, D.L. (2011). *Environmental Protection and Human Rights*. Cambridge University Press; Pathak, P. (2014). Human Rights Aprroach to Environmental Protection. *OIDA International*

environmental human rights into "substantive environmental rights" and "procedural environmental rights"; the first category relates to the right to a healthy environment, while the second category refers to the individuals rights of information, public participation in environmental decision-making and access to justice in environmental matters.[19] Furthermore, the United Nations Environment Programme (UNEP) identifies three main dimensions of the interrelationship between human rights and environmental protection:

> "[1] The environment as a pre-requisite for the enjoyment of human rights (implying that human rights obligations of States should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights); [2] Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, as essential to good environmental decision-making, (implying that human rights must be implemented in order to ensure environmental protection; and [3] The right to a safe, healthy and ecologically-balanced environment as a human right in itself (this approach has been debated)."[20]

Despite the recognized interrelationship between human rights and environmental protection, and accordingly human rights violations and environmental degradation, the two concepts have been treated by governments and part of academia as unrelated issues. Yet, this paper supports that this interrelationship justifies an integrated approach to environment and human rights, so it addresses the issues of human rights and environment (in its relevant Chapters) in conjunction.

Then, another issue that arises is "who can invoke human rights?" and "whose human rights?", as "[h]uman rights are *per essence* focused on individual human beings".[21] In the host States cases, it is clear that the host State has invoked the human rights of its population. In the investors' cases, investors have invoked their own "human" rights either as individuals or as legal entities. At this point, it should be clarified that, although this paper acknowledges and empathizes with the issues raised by part of the academic community, it does not address

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Journal of Sustainable Development, Vol. 07, No. 01, 17-24. Available at SSRN: https://ssrn.com/abstract=2397197; Pavoni R. (2009), supra note 16; Rosalien Diepeveen, Yulia Levashova, & Tineke Lambooy. (2014). "Bridging the Gap between International Investment Law and the Environment", 4th and 5th November, The Hague, The Netherlands. *Utrecht Journal of International and European Law*,*30*(78), 145-160.

[19] Pavoni R. (2009), supra note 16, at pp.526-7; See the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention), adopted at Aarhus, Denmark, on 25 June 1998, entered into force on 30 October 2001. Available at: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[20] See United Nations Environment Programme. *Human Rights and the Enviroment*. Available at: http://www.unep.org/delc/HumanRightsandTheEnvironment/tabid/54409/Default.aspx.

[21] Dupuy P. (2009), supra note 8, at p. 45.

the problematic around the issue of recognition (or not) of corporations as "bearers of human rights", neither it deals with the nature of investors' rights.[22] With regard to the issue of "human rights" of legal entities, the present paper reflects the approaches followed by the international human rights courts and it presents, when it is relevant, the respective considerations of investment arbitral tribunals on this issue.[23]

Taking all above into account, the present paper is concerned with human rights arguments in investor-state arbitration as raised by the investor (Chapter 2) and by the host State and the amici in support of the host State's defense (Chapter 3). First of all, an overview of the theoretical framework within which human rights issues become relevant in investor-state arbitration is considered an essential basis to recur to during the cases' presentation and analysis. Considering that need, Chapter 1 presents a synopsis of the general debate in regard of the interplay between investment law and human rights (Chapter 1.1.), references to human rights jurisprudence made by the arbitral tribunals, as evidence of this interplay (Chapter 1.2.) and, finally, the principal avenues through which arbitral tribunals can take into account human rights when deciding investment disputes (Chapter 1.3.).

Then, Chapter 2 concentrates on human rights arguments that investors have raised in investor-state arbitration and provides some further considerations on that matter. Considering human rights as an investor's sword in investor-state arbitration, the classification of the human rights arguments raised by the investors is based on the different purposes the invocation of these arguments serve. In this regard, the present paper identifies three cases, where the investor can use human rights arguments as a sword in investor-state arbitration: a)

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[22] Isiksel stresses the fact that "in some fields of international economic law, firms are increasingly considered not just legal persons but bearers of human rights" and critically examines, in her article, "the incipient arrogation of human rights discourse in the context of international investment arbitration, where the claims of firms are often articulated and adjudicated with language and standards borrowed from human rights law". She describes this development as "the dehumanization of human rights". Isiksel (2016), supra note 11, at pp. 294-5; See also Scolnicov, A. (2013). Lifelike and Lifeless in Law: Do Corporations Have Human Rights? (May 2013). *University of Cambridge Faculty of Law Research Paper No. 13/2013.* Available at SSRN: https://ssrn.com/abstract=2268537; For the nature of investors' rights, see Gourgourinis, A. (2013). Investors' Rights Qua Human Rights? Revisiting the "Direct/"Derivative" Rights Debate, in: *The Interpretation and Application of the European Convention of Human Rights,* 147-182.

[23] For instance, with regard to the right to property, "[u]nder the ECHR, corporations as legal entities have the right to property, which means that a foreign corporate investor could allege human rights-based claims against a state for conduct giving rise to expropriation". Karamanian, S. L. (2013), supra note 3, at pp. 433-4. By contrast, the inter-American system "encompasses the protection of some individual rights connected to economic interests", yet it restricts legal persons to access the system "under Article 1.2. of the IACHR and the Commission's particularly restrictive interpretation in this matter". Nikken, P. (2009). Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights. In: Dupuy, P.M., Francioni, F. and Petersmann, E-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 246-271, at p. 247.

when the investor claims its own human rights' violation, either as an independent human rights claim (Chapter 2.1.1.) or in support of treaty violations (Chapter 2.1.2.), b) when the investor raises environmental arguments to support a treaty violation (Chapter 2.2.) and c) when the investor - as an individual - invokes its right to a nationality to establish the tribunal's jurisdiction *ratione personae* (Chapter 2.3.).

Subsequently, Chapter 3 focuses on human rights arguments raised by the host States and the amici in support of the host State defense. More specifically, it focuses, first, on cases where the host States have invoked international human rights law in support of their defense (Chapter 3.1.) and, secondly, on cases where the host States have relied primarily in domestic human rights and environmental provisions, while international human rights law argumentation has been provided by the amici (Chapter 3.2.).

1. INTERNATIONAL INVESTMENT LAW AND INTERNATIONAL HUMAN RIGHTS LAW: CO-EXISTING REGIMES

According to Joost Pauwelyn, "[o]ne of the most […] urgent problems in international governance is how the different branches and norms of international law interact, and what to do in the event of conflict […] The main challenge is to marry trade and non-trade rules, or economic and non-economic objectives, at the international level."[24]

1.1. A Synopsis of the General Debate

Indeed, there has been much debate about the relationship and interaction between international investment law (IIL) and international human rights law (IHRL). Scholars' positions have varied: some of them discussed the fragmentation of international law in the case of IIL (Van Aaken, 2008) and the divergent paths of investment tribunals and human rights (Hirsch, 2009); others have documented evidence of unity rather than fragmentation of international law in investor-state arbitration (Fry 2007; Dupuy, 2009).[25] Specifically, Dupuy illustrated how arbitrators can resort to principles of treaty interpretation, 'general principles of law', customary rules and States' human rights obligations in order to avoid conflicts among different treaty regimes, while Hirsch pointed out the different normative features (investment treaty obligations *per se* v. human rights obligations *erga omnes*) and institutional features of IIL and IHRL.[26]

Some literature has drawn insights into the 'human nature' of international investment law, unraveling the human rights components this regime is made of (Radi, 2013) and the

[24] Joost Pauwelyn (2009). Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law, Cambridge University Press, 2009, Frontmatter, as cited in Gordon, K., Pohl, J., & Bouchard, M. (2014). Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey. *OECD Working Papers on International Investment*, (1), 1-70,72-74, at p. 19, footnote 34.

[25] Van Aaken, A. (2008). Fragmentation of International Law: The Case of International Investment Protection. *Finnish Yearbook of International Law Vol. XVII*, 91-130 (2008); *U. of St. Gallen Law & Economics Working Paper No. 2008-01*. Available at SSRN: http://ssrn.com/abstract=1097529; Hirsch, M. (2009) supra note 2; Fry, J.D. (2007). International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity. *Duke Journal of Comparative & International Law, Vol. 18*, 77-149; Dupuy P. (2009), supra note 8.

[26] Petersmann, E.-U. (2009). Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication? In: Dupuy, P., Francioni, F. and Petersmann E.-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 3-42, at p. 14; Hirsch, M. (2009), supra note 2, at pp. 107-12.

commonalities between IHRL and IIL (Dupuy, 2009; Francioni, 2009).[27] Indeed, the IIA's guarantees against expropriation reflect the right to protection of property, while there is "an underlying and deep entrenched relationship" between the FET standard and a series of basic human rights, the prohibition of the denial of justice and the right to an effective remedy, as well as between the MFN and NT clauses and rights against discrimination, the FPS standard and the right to life and security.[28]

Alvarez, observing that many of the investment protections under NAFTA "…echo human rights contained in the Universal Declaration of Human Rights and the principal human rights conventions…" concluded that "[s]een from this perspective, the NAFTA investment chapter is a human rights treaty for a special-interest group".[29] Isiksel remarks, apart from the substantive standards "that mimic human rights provisions", a number of structural parallels between the international investment regime and international human rights law, including the private parties' ability to bring claims against states before transnational adjudicative mechanisms, yet she is concerned with "the dehumanization of human rights" resulting from the appropriation of international human rights norms in the context of IIL.[30]

Furthermore, scholars have been concerned with possible avenues and approaches that could make investor-state arbitration a place for human rights (Simma, 2011; Karamanian, 2013; Wythes, 2010). There is also substantial literature on possible tensions between IIL and IHRL, either through inconsistencies between their norms or through the international investment treaties potential to disturb host States' ability to promote human rights and genuine development (Waincymer, 2009).[31]

In particular, the role - positive and negative - of international investment law in environmental protection and sustainable development has been a matter of intense theoretical

[27] Radi, Y. The 'Human Nature' of International Investment Law (June 13, 2013). Grotius Centre Working Paper 2013/006-IEL; Leiden Law School Research Paper . Available at SSRN: https://ssrn.com/abstract=2278857; Dupuy 2009; Francioni, F. (2009). Access to Justice, Denial of Justice, and International Investment Law, in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press, 63–81.

[28] Dupuy, 2009, at p. 52.

[29] Alvarez, J.E (1997). Critical Theory and the North American Free Trade Agreement's Chapter Eleven, 28 Univ. Miami Int-Am L. Rev. 303, at 307-8, as cited in Isiksel (2016), supra note 11, at p. 311.

[30] See Id., at pp. 310-312.

[31] Waincymer, J. (2009). Balancing Property Rights and Human Rights in Expropriation. In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 275-309, at pp. 296-7.

debate. Scholars and policy-makers are in pursuit of balanced approaches that could bridge the gap between international investment law and environmental rights (Mann, 2013; Gordon et al, 2014; Diepeveen et al, 2014; Cely, 2014; Beharry and Kuritzky, 2015), while, at the same time, some critical appraisals draw insights into human rights and environmental harm caused or enabled by international investment agreements (Krstik, 2013).[32]

Cotulla argues that the outcome is "an international legal regime shaped by forces that push towards convergence between IHRL and IIL, such as conceptual commonalities and cross-referencing in international jurisprudence, but also towards divergence, including different treaty formulations and interpretive approaches".[33]

The above issues that form the general debate on the interrelationship between international investment law and international human rights law continuously appear and evolve throughout the thesis. Hereunder, I will focus on cases of arbitral tribunals' resort to human rights jurisprudence - as evidence of the interrelationship between the two regimes. It is worth mentioning that until now, there is no evidence for the opposite, meaning evidence of human rights courts' resort to investment arbitration case law. However, the interplay of the two regimes has come into view and has been assessed by human rights courts, in specific cases. At this point, I shall only discuss two cases that came to my attention. The ECtHR has referred to investment arbitration cases, when it had to address jurisdictional objections due to the existence of parallel proceedings before the ECtHR and an arbitral tribunal.[34] Moreover, the IACtHR, in the *Sawhoyamaxa Community* case, has addressed the relationship between the IACHR and a bilateral investment treaty, recognizing "a higher hierarchy or, at least, a preferred standard of application of the IACHR over the BIT.[35] The argumentation provided was that the IACHR "is a multilateral treaty on human rights" that "does not depend entirely on reciprocity among States".

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[32] Cely, N. (2014). Balancing profit and environmental sustainability in Ecuador: Lessons learned from the Chevron case. *Duke Environmental Law & Policy Forum,24*(2), 353; Krstik, S. (2013). *The Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and Colombia and Home State Responsibility to Prevent Transnational Human Rights and Environmental Harm Caused or Enabled by International Investment Agreements*, ProQuest Dissertations and Theses.

[33] Cotula, L. (2015), supra note 15, at p. 122.

[34] See the OAO Neftyanaya Kompaniya Yukos v. Russia, ECtHR Case - Application no. 14902/04, Judgment 20 September 2011 (Final 08/03/2012); For the issue of the existence of parallel proceedings before the ECtHR and investment arbitral tribunals, see the following Chapter 2.1. (D) *"AMTO v. Ukraine, Yukos v. Russia: parallel proceedings before the ECtHR".*

[35] Nikken, P. (2009). Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights. In: Dupuy, P.M., Francioni, F. and Petersmann, E-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 246-271, at pp. 267-70.

1.2. Investment Tribunals' References to Human Rights Jurisprudence as Evidence of Interplay between the Two Regimes

Reiner and Schreuer support that the occasional initiatives of tribunals to refer to human rights courts judgments as authority for their decisions demonstrate the influence of IHRL on investor-state arbitration.[36] Likewise, Isiksel observes that "arbitrators themselves look to international human rights law to gauge the treatment owed by states to foreign corporations" by making use of both substantive and procedural guarantees under IHRL as well as "doctrinal tools" of human rights court jurisprudence; substantive and procedural guarantees can include property rights and rights to access to justice and due process, while the "doctrinal tools" include, among others, the principle of proportionality and the least restrictive means test.[37]

The tribunal in the case of *Mondev v. the United States* embraced, in its award, a lengthy analysis of international human rights instruments and jurisprudence, to assess an alleged violation of minimum standards of treatment under Article 1105 of NAFTA (FET standard).[38] The case concerned a commercial real estate development contract concluded between a Massachusetts limited partnership owned by Mondev, the City of Boston and the Boston Redevelopment Authority, and the following suit filed by Mondev in Massachusetts' courts against the two other contracting parties. The dispute arose when the suit was dismissed by reason, inter alia, of "a Massachusetts statute granting the BRA immunity from suit for intentional torts". The investor alleged that the US courts' decisions and the acts of public officials violated the NAFTA standards of protection.

The tribunal, in order to address the arising issues of retroactive application of a new law and statutory immunities, referred to ECtHR jurisprudence and stated that ECtHR judgments can provide "guidance by analogy".[39] Specifically, with regard to the immunities of public authorities, the tribunal recognized an analogy between the relevant issue and

[36] Reiner, C. and Schreuer, C. (2009), supra note 3, at p. 94.

[37] Isiksel (2016), supra note 11, at p. 311.

[38] See Castillo, Y. (2012). The Appeal to Human Rights in Arbitration and International Investment Agreements. *Anuario Mexicano de Derecho Internacional, vol. XII, 2012*, 47-84, México, D. F., ISSN 1870-4654, Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas, at pp.69-70, and Hirsch, M. (2009), supra note 2, at pp. 100-1.

[39] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at paras 138 and 141-144.

ECtHR's interpretation of Article 6 (1) of the ECHR in certain decisions concerning statutory immunities of State agencies before their own courts.[40] Yet the tribunal, after discussing the ECtHR case law, concluded that "[t]hese decisions concern the "right to a court", an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of 'treatment in accordance with international law, including fair and equitable treatment and full protection and security'.".[41] Finally, the tribunal did not find a breach of the minimum standard of treatment.

In the case of *Saipem v. Bangladesh*, the basis of investor's claims was the undue intervention of the host-state courts in an international commercial arbitration (ICC), which precluded the enforcement of the ICC award in Bangladesh or elsewhere.[42] According to the investor, the national courts' interference amounted to an expropriation. The tribunal relied on ECtHR jurisprudence to conclude that investors' rights under judicial decisions are protected property and can be the object of an expropriation and, thus, the illegal interference by national courts in an international commercial arbitration lead to a claim for expropriation.

Furthermore, there are cases where the arbitral tribunals used the principle of proportionality - a principle used by the ECtHR to determine whether or not there has been a breach of Article 1 of Protocol No.1 of the ECHR (protection of property) – to decide upon the existence or not of an indirect expropriation. Namely, the case of *Tecmed v. Mexico* was the first case in which an arbitral tribunal made use of the principle of proportionality.[43] In its award, the tribunal referred to ECtHR jurisprudence on proportionality principle, particularly

[40] Id., at para 143 of the award: "In a number of cases the European Court of Human Rights has held that special governmental immunities from suit raise questions of consistency with Article 6(1) of the European Convention on Human Rights, because they effectively exclude access to the courts in the determination of civil rights".
[41] Id., at para 144.
[42] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, 30 June 2009.

[43] In the *Tecmed* case, the Claimant, a US company, alleged that the non-renewal of the permit to operate a landfill of hazardous waste by Mexico's environmental agency constituted an indirect expropriation. Mexico supported that the measure was a legitimate regulatory action to protect the environment. See Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003; Krommendijk, J., Morijn, J., Dupuy, P.M., Petersmann, E., Francioni, F., International European Law, & RS: FdR RvdM Glob. en Mensenrecht. (2009). Balancing investor interests and human rights by way of applying the proportionality principle in investor-state arbitration. *Human Rights in International Investment Law and Arbitration,* 422-452, at p. 439; Castillo, Y. (2012). The Appeal to Human Rights in Arbitration and International Investment Agreements. *Anuario Mexicano de Derecho Internacional, vol. XII, 2012*, 47-84, México, D. F., ISSN 1870-4654, Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas, at p. 68.

to *James v. UK* ECtHR judgment[44], in order to decide upon the existence or not of an indirect de facto expropriation.[45] Then, in *Azurix v. Argentina*, the tribunal followed *Tecmed*'s award, by citing the same ECtHR judgment, applying the proportionality test and recognizing its "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation".[46]

1.3. Inserting Human Rights Arguments in Investor-State Arbitration: The Principal Avenues

There are different avenues through which arbitral tribunals can take into account human rights when deciding investment disputes. The principal avenues that this paper identifies are: a) the inclusion of international human rights law (and international environmental law) within the investment treaty's general provisions on governing or applicable law (when any relevant rules of international law are applicable); human rights norms can also be considered by an arbitral tribunal as part of the applicable host State national law and under the "in accordance with the host stale law" clause, b) the interpretation of investment terms or concepts by using human rights jurisprudence or general principles of IHRL, on the basis of the principle of systemic integration as codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), and c) the incorporation of explicit human rights-based provisions into the IIA itself.[47] Moreover, d) amicus curiae submissions can offer essential human rights argumentations in investor-state arbitration.

In this regard, jurisdiction and the applicable law are decisive on how far human rights arguments can go in investor-state arbitration.[48] Jurisdiction, to this point, is significant mainly in respect of investor's independent human rights claims, that will be discussed in the following relevant Chapter 2.1.1.. This is because, the vast majority of IIAs bar the host State

[44] Case of James and others v. the United Kingdom, ECtHR - Application No. 8793/79, Judgment, 21 February 1986.

[45] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at para 116; The ECtHR has used the principle of proportionality to determine whether or not there has been a breach of Article 1 of Protocol No.1 of the ECHR (protection of property).

[46] See Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, at para 254 (for the Respondent's defense based upon State's human rights obligation to protect the consumers' rights), at paras 311-2 (for the reference to Tecmed award, the ECtHR James v. UK judgment and the principle of proportionality) and at para 442 (for the decision).

[47] Simma (2011), at p. 581.

[48] Henin (2013), at p. 237.

from initiating on its own arbitral proceedings.[49] Moreover, even if investment treaties contain broad enough dispute resolution clauses to encompass counterclaims – most of them do not, it is unclear whether a host State can submit counterclaims against a foreign investor, when an arbitral tribunal normally has jurisdiction to adjudicate only disputes originating from alleged violations of treaty provisions.[50]

A. Human Rights Norms as Applicable Law

Starting from general principles, an indispensable requirement for a tribunal's jurisdiction is the parties' consent to arbitration.[51] The scope of jurisdiction is defined and limited by the compromissory clause (*clause compromissoire*) in which the States parties to the investment treaty have expressed their consent to the arbitral tribunal's jurisdiction, meaning that the scope of jurisdiction is limited to the specific category of disputes the states have accepted to submit to the tribunal.[52] The tribunal, therefore, in investor-state arbitration, derives its authority to rule on a dispute from the consent of the parties to bring such dispute before arbitration. The majority of the IIAs limit the jurisdiction of the tribunal to "investment disputes" or to "alleged violations of the substantive rights in the investment treaty".[53] Consequently, the tribunal cannot extend its jurisdiction to other categories of disputes

[49] Dumberry, P., & Dumas-Aubin, G. (2012). When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration. *The Journal of World Investment & Trade, 13*(3), 349-372, at pp. 358-9.

[50] Bjorklund, Andrea K. (2013). The role of counterclaims in rebalancing investment law. *Lewis & Clark Law Review, 17*(2), 461-480, at p. 461; See the recent cases of Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6. Interim Decision on the Environmental Counterclaim, 11 August 2015 and Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, where the host States filed counterclaims.

[51] Dozler and Schreuer (2012). *Principles of International Investment Law*. Oxford University Press. 2nd edition, at p. 254.

[52] We should bear in mind that the mere fact of ratification of the ICDID Convention does not count as a consent of the State and if the dispute is to be settled by an ICSID tribunal, the tribunal, in order to determine its scope of jurisdiction, has to look at the wording of the compromissory clause of the IIA jointly with Article 25 of the ICSID Convention. See Dupuy P. (2009), supra note 8, at p. 56.

[53] See Reiner, C. and Schreuer, C. (2009), supra note 3, at pp. 83-84, and De Brabendere, E. (2013) Human Rights Considerations in International Investment Arbitration. Published in eds: Fitzmaurice M. and Merkouris P. The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications. Leiden/Boston: Martinus Nijhoff Publishers, 2012; Grotious Centre Working Paper 2013/001-IEL; Leiden Law School Legal Studies Research Paper Series, at pp. 12-13.

between the parties, and "the mere allegation of a human rights violation would not suffice to confer jurisdiction on a tribunal".[54]

However, the limited scope of jurisdiction does not imply that the tribunal cannot as a matter of principle consider human rights issues raised by the parties, when deciding on an investment dispute; human rights considerations as a matter of applicable law are not excluded.[55] The tribunal in *Channel Tunnel v. UK and France* explained "this distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so".[56] The tribunal supported that the fact that it lacks jurisdiction to consider claims for breaches of obligations extrinsic to the investment treaty does not mean that the rules of the applicable law are without significance; instead, these rules provide the legal background for the interpretation and application of the investment treaty, and, in addition, they may well be relevant in other ways.[57] The Claimants had referred to the ECHR and its First Protocol, among others, as "relevant principles of international law" to be applied.[58]

Therefore, since, in practice, the wording of the compromissory clause is important, not only for the tribunal's jurisdiction, but also for the law to be applied by the tribunal, another thing to be assessed is whether the relevant clause contains any reference to public international law.[59] Farrugia argues that as the rights created by the investment treaties "exist on the plane of international law", accordingly, the applicable law is necessarily international law, as no provision of national law may be deployed to interpret these instruments.[60]

This is important because, in the absence of explicit human rights provisions in the investment treaties, human rights norms are applicable to the extent that they are included in the applicable law chosen by the parties.[61] Then, if the applicable law includes – as typically does - treaty rules, host state national law and relevant international law, IHRL is applicable

[54] Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184-203, as cited in Reiner and Schreuer (2009), supra note 3, at pp. 83-84.

[55] Brabandere, at p. 14.

[56] Channel Tunnel v. UK and France, Partial Award, at para 152.

[57] Id., at para 151.

[58] Id., at paras 101 and 110.

[59] Id, at p. 14 and Dupuy (2009), at p. 56.

[60] Farrugia, B. (2015). The human right to water: Defences to investment treaty violations. *Arbitration International, 31*(2), 261-282, at p. 264.

[61] See Reiner and Schreuer (2009), supra note 3, at p. 84 and Kriebaum, U. (2009), supra note 12, at p. 661; See also the following *"C. Human Rights Provisions or References in International Investment Agreements"*.

as a component of international law.[62] In this respect, Article 42 (1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.". Similarly, Article 1131 (1) of the NAFTA, regarding the "Governing Law", provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.", while according to Article 26(6) of the ECT "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law".[63] The reference to international law is understood under the context of the sources provided for in Article 38 of the ICJ Statute.[64]

Human rights norms may be also applicable as part of the host State's national law (the host State's Constitution, environmental law, mining law, investment law e.t.c.).[65] The applicable law in investor State arbitration may include provisions of the host State's own domestic law that bind the host States and the investors to the respect of public health, environmental protection or social standards, and guarantee to all, including the investors, the right to a fair trial, the freedom of association, e.t.c..[66] This is also consistent with Article 42 (1) of the ICSID Convention.

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[62] ICSID Convention, available online at: https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp, Article 42 (1).

[63] North American Free Trade Agreement (NAFTA), 32 ILM 289, 605 (1993), available online at: https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement, article 1131(1); Energy Charter Treaty (ECT) 34 ILM 360 (1995), available online at: http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/, at article 26 (6). For more examples of IIAs' relevant provisions, see Reiner and Schreuer, supra note 3, at pp. 84-85 and Brabandere, at p. 14.

[64] The sources provided for in Article 38 (1) of the ICJ Statute are: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[65] In the case of *Siemens v. Argentina*, the host State argued that international human rights instruments had a constitutional status under national law. More specifically, the host State stated "that the human rights so incorporated in the Constitution would be disregarded by recognizing property rights asserted by the Claimant given the social and economic conditions of Argentina". Siemens AG v. Argentina, Award, 6 February 2007, ICSID Case No ARB/02/08, at paras 74-75, as cited in Hirsch, M. (2009), supra note 2, at p. 103.

[66] Francioni, F. (2009). Access to Justice, Denial of Justice, and International Investment Law, in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press, 63–81, at p.72.

Then, as the rights reflected in the standards provided by the investment treaties, meaning the guarantees against expropriation, the FET and FPS standards, the MFN and NT clauses, are to be interpreted according to the applicable law, it is through this interpretation that human rights considerations become relevant in investor-state arbitration.[67] However, as it is explained below, customary rules of treaty interpretation govern anyway the investment treaties, meaning that, even if the investment treaty does not provide for its interpretation in light of wider international law, the principle of systemic integration will apply in any case.[68]

B. Systemic Integration of Human Rights By Resource to Article 31(3)(c) of the VCLT

Alvarez argues that international treaty regimes, including the international investment and trade regimes, "are not self-contained silos separate from the rest of international law".[69] The inclusion of references to general international law in the respective treaties (IIAs and FTAs) and the reliance on sources of international law in the adjudicative 'case law' produced under many of them prove this argument.[70] The international treaty regimes are not self-sufficient, meaning that they cannot be disconnected from the governing rules on treaty interpretation codified in the VCLT or customary rules governing state responsibility.[71] Instead, the need for reasoned opinions by international treaties' interpreters leads them to "boundary crossings" across international legal regimes.

Indeed, as it was discussed above, most investor-state arbitrations relate to legal claims based on IIAs that explicitly state, through their choice of law and jurisdiction clauses, that tribunals should consider "such rules of international law as may be applicable".[72] These clauses open the avenues for the incorporation of international human rights law and environmental law into international investment law, an approach that is in full conformity with the principle of systemic integration and harmonization advocated by the International

[67] Farrugia, at p. 263.

[68] Wood, 2015, at p. 679.

[69] Alvarez, J. (2016). 'Beware: Boundary Crossings' – A Critical Appraisal of Public Law Approaches to International Investment Law. *The Journal of World Investment & Trade, 17*(2), 171-228, at p. 172; The tribunal in the case of Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka, ICSID Case No ARB/87/3, Award (27 June 1990), para 21 stated that "the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods...whether of international law character or of domestic law nature", as cited in Wood, T. (2015). Political Risk or Political Right? Reconciling the International Legal Norms of Investment Protection and Political Participation. *ICSID Review - Foreign Investment Law Journal,30*(3), 665-688, at p. 679.

[70] Alvarez, 2016, at p. 172.

[71] Id, at pp. 173-4.

[72] Petersmann, E. (2009). International Rule of Law and Constitutional Justice in International Investment Law and Arbitration. *Indiana Journal of Global Legal Studies,16*(2), 513-533, at p. 525.

Law Commission (ILC) in its work on the fragmentation of international law as well as with the Vienna Convention on the Law of Treaties (VCLT) customary rules of treaty interpretation.[73]

Simma argues for a "systemic integration" of human rights by resource to article 31 (3) (c) of the VCLT that allows arbitrators to consult "together with the context…any relevant rules of international law applicable in the relations between the parties", when interpreting an international treaty.[74] Namely, Simma argues that in the context of the interpretation of an IIA, the VCLT's Article 31 (3) (c) should be applied to allow not only the application of human rights treaty obligations to which the States parties are subject but also the incorporation of more general human rights rules that are generally applicable not only to the specific IIA parties but among states generally.[75] Wood also supports that conventional international rules (under binding human rights conventions, such as the ICCPR and ECHR) and customary international rules (in the UDHR, for example) are equally relevant to investment treaties' interpretation.[76] Alvarez notices, furthermore, that tribunals are not likely to reach for such contentions on their own, and it largely depends upon the disputing parties to introduce such argumentation in support of the above broad reading of the VCLT rule.[77]

Thus, Article 31 (3) (c) of the VCLT can permit interpretations of IIAs that do not conflict with host States' human rights obligations, by allowing human rights to guide the interpretation of investment law concepts and treaty provisions so as "'to accommodate...human rights considerations".[78]

At this point, having presented both avenues of IHRL as applicable law and the systemic integration of human rights through treaty interpretation, Krommendijk and Morijn

[73] As Vadi writes "[c]ustomary rules of treaty interpretation are applicable to investment treaties because investment treaties are international law treaties. Further, some investment treaties expressly mention these rules.". Vadi, V.-S. (2009). Reconciling the Public Health with Investor Rights: The Case of Tobacco. In: Dupuy, P.-M., Francioni, F., Petersmann, E.-U. (eds) *Human Rights in International Investment Law and Arbitration*, 452-486, International European Law, & RS: FdR RvdM Glob. en Mensenrecht, at p. 470.

[74] Simma, B. (2011) 'Foreign Investment Arbitration: A Place For Human Rights?', *International and Comparative Law Quarterly*, 60(3), pp. 573–596. doi: 10.1017/S0020589311000224, at p. 584; Wood writes that although the investment arbitration awards do not refer to the principle of systemic integration by name, the spirit of the principle infuses a number of these. Wood, T. (2015). Political Risk or Political Right? Reconciling the International Legal Norms of Investment Protection and Political Participation. *ICSID Review - Foreign Investment Law Journal*,*30*(3), 665-688, at p. 679.

[75] Alvarez, 2016, at p. 181.

[76] Wood, 2015, at p. 678.

[77] Alvarez, J.E. (2011). *The Public International Law Regime Governing International Investment.* Hague Academy of International Law, at p. 467.

[78] Vinuales, J.E. 'Sovereignty in Foreign Investment Law' in Zachary Douglas and others (eds), The Foundations of International Investment Law (2008), at p. 294, as cited in Wood, 2015, at p. 678.

thoughts regarding the insignificant distinction between taking into account human rights directly or 'only' indirectly (by interpreting investment provisions through the general principle of Article 31(3)(c)) are considered relevant.[79] They argue that, in practice, "the entry of human rights by either route seems to have the same effect", taking into account that "it would be difficult to apply something without at the same time interpreting it, and to interpret a term without a context in which to apply it".[80]

C. Human Rights Provisions or References in International Investment Agreements

With regard to the incorporation of human rights provisions into the IIAs, there is evidence of reform in recent IIAs, which can reinforce or change the existing avenues of human rights considerations in investor-state arbitration. Indeed, the BITS, mainly the pre-1990, do not contain any human rights provisions and it is even exceptional to find any reference at all to human rights, except for a few BITs that contain references to human rights in their preamble and a limited number of BITs that contain a provision dealing with respect for the environment and labour rights.[81] However, according to the UNCTAD World Investment Report 2016, recent reforms in a significant number of model IIAs, included, among others, a) references to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble, b) explicit recognition that parties should not relax health, safety or environmental standards to attract investment, c) promotion of corporate social responsibility standards through incorporation of a separate provision into the IIA or as a general reference in the treaty provision, and d) general exceptions for the protection of human, animal, plant life or health and the conservation of exhaustible natural resources.[82]

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[79] Krommendijk, J., Morijn, J. (2009). Balancing investor interests and human rights by way of applying the proportionality principle in investor-state arbitration. In: Dupuy, P.M., Francioni, F. and Petersmann, E-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 422-452, at p. 426.

[80] Ibid.

[81] The Norwegian Model BIT (2007), the European Free Trade Area Singapore Free Trade Agreement (FTA) and the Canada-Colombia FTA contain references to human rights in their preamble. The United States Model BIT, the Canadian Model BIT, and recent FTAs entered into by Canada, contain a provision dealing with respect for the environment and labour rights. Dumberry and Dumas-Aubin, at pp. 359-360; See also Mann, H. (2008). *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities.* International Institute for Sustainable Development, at pp. 9-10 (regarding existing IIAs provisions) and at pp. 12-15 (regarding proposals for human rights provisions' development); Kriebaum, U. (2009), supra note 12, at pp. 662-664.

[82] See UNCTAD, World Investment Report 2016. *Investor Nationality: Policy Challenges*. United Nations Publications. Available at: http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf, at p. 111;

Keeping in mind that, according to article 31 (1) and (2) of the VCLT, a tribunal should interpret the IIA "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and that the context of a treaty includes its text, preamble and annexes, these reforms could change the existing (im)balances in investor-state arbitration, in favor of States' human rights and environmental defenses.[83]

D. *Amicus curiae* submissions

Finally, another avenue for the introduction of human rights arguments in investor-state arbitration is through the *amicus curiae* submissions.

> "An amicus curiae is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding […] The traditional role of an amicus curiae in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as amicus curiae is an offer of assistance – an offer that the decision maker is free to accept or reject."[84]

At first, Article 44 of the ICSID Convention granted arbitral tribunals the power to admit *amicus curiae* submissions from suitable non-parties in appropriate cases.[85] Article 44 of the ICSIC Convention (in Section 3: Powers and Functions of the Tribunal) provides that:

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[83] Article 31 (1) and (2) VCLT; Although "human rights clauses at the preambles do not bring directly any enforceable rights and obligations", they "could be relevant when interpreting other provisions". Krommendijk, J., Morijn, J. (2009). Balancing investor interests and human rights by way of applying the proportionality principle in investor-state arbitration. In: Dupuy, P.M., Francioni, F. and Petersmann, E-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 422-452, at p. 425; See Karamanian, S.L. (2013), supra note 3, at p. 442; Moreover, Bjorklund suggests that "drafting treaties to permit closely related counterclaims would help to rebalance investment law by enabling both parties to bring all claims related to a dispute with a single tribunal's authority". BJorklund, at p. 461.

[84] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17 (formerly Aguas Provinciales de Santa Fe S.A, Suez, Sociedad General de Aguas de Barcelona, S.A., Order in Response to a Petition for Participation as Amicus Curiae (English), 17 March 2006, at para 13 [hereinafter Aguas Provinciales de Santa Fe, Order in Response to a Petition for Participation as Amicus Curiae(English)]

[85] See cases where the tribunal, based on Article 44 of the ICSID Convention, accepted *amicus curiae* submissions: Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, Order in response to a Petition for Participation as Amicus Curiae (English), 19 May 2005, at paras 8-16; Aguas Provinciales de Santa Fe, Order in Response to a Petition for Participation as Amicus Curiae(English), at paras 9-16; On the contrary, in the case of *Aguas del Tunari v. Bolivia*, the tribunal, in response to the Petition by NGOs and people to participate as an intervening party or amici curiae, argued that "your [their] core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved [the ICSID Convention and the BIT] and the consensual nature of arbitration places the control of the issued you raise with the Parties, not the Tribunal. In

"Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

The accepted interpretation of the above ICSID rule was that it explicitly allowed the tribunal to decide any question of procedure not covered by those instruments or by a rule agreed by the parties. Moreover, nothing in the ICSID Convention or the ICSID Arbitration Rules precluded Petitioners' participation.

However, since April 2006, the amended ICSID Arbitration Rules explicitly give tribunals the power to allow for submissions of non-disputing parties to the tribunal. Specifically, rule 37(2) of the new ICSID Arbitration Rules provides for "Submissions of Non-disputing parties to the Tribunal":

"After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute […]"[86]

The rule makes explicit that the tribunal has jurisdiction to accept *amicus curiae* submissions and that it may do so without the approval of one or both of the arbitrating

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particular it is manifestly clear to the Tribunal that it does not, absent the agreement of the parties, have the power to join a non-party to the proceedings; to provide access to hearings to non parties and, *a fortiori*, to the public generally, or to make the documents of the proceedings public." Aguas del Tunari, SA v. Bolivia, ICSID Case No ARB/02/3, Petition by NGOs and people to participate as an intervening party or amici curiae, 29 August 2002, at para 50 and Aguas del Tunari, SA v. Bolivia, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 October 2005, at paras 15-18.

[86] ICSID Rules, Rule 37 (2) further states:

> "In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

parties.[87] Indeed, the rule "requires a tribunal to consult with the parties, but does not ascribe to either or both parties together a veto over a decision by a tribunal to exercise its discretion".[88] This is consistent with the very notion of *amicus curiae* that it be a friend of the court, and serves the court's purpose of a fully informed decision. However, the tribunals, even in cases of essential public interest, sometimes have denied amicus curiae submissions, despite the amended ICSID Arbitration Rules.[89]

[87] In the case of *Biwater v. Tanzania*, the involvement of the Petitioners was permitted by the tribunal notwithstanding investor's opposition. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, at para 356; In the case of *Pac Rim v. El Salvador*, the Center for International Environmental Law (CIEL), with its coalition of six communities and other organizations, submitted an application as a non-disputing party pursuant to ICSID Arbitration Rule 37 (2). See Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Submission of Amicus Curiae Brief by Centre for International Environmental Law, 25 July 2014 and Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Award, 14 October 2016, at paras 1.48 and 3.28.

[88] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, 27 November 2006, at p. 10.

[89] See Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Procedural Order No. 2 (26 June 2012); European Center for Constitutional and Human Rights (ECCHR) (July 2012). *Human Rights Inapplicable in International Investment Arbitration? A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal.*

2. HUMAN RIGHTS ARGUMENTS: A SWORD FOR THE INVESTOR

The present paper identifies three cases, where the investor can use human rights arguments as a sword in investor-state arbitration: a) when the investor claims the violation of its own human rights either as independent human rights claims (Chapter 2.1.1.) or in support of treaty violations (Chapter 2.1.2.), b) when the investor raises environmental arguments to support treaty violations (Chapter 2.2.) and c) when the investor invokes its right to a nationality to establish the tribunal's jurisdiction *ratione personae* (Chapter 2.3.).

2.1. INVESTOR CLAIMING ITS 'HUMAN' RIGHTS VIOLATION

The first ICSID case for 2016 was the *Al Jazeera v. Egypt* case.[90] The Al Jazeera Media Network claimed a destruction of its media business in Egypt, during repeated police raids in the country.[91] Specifically, according to the Press Release[92] of 27 January 2016, in the months following the Egyptian coup d'état, a large number of Al Jazeera journalists were subjected to harassment, arbitrary arrest and detention; either without any charge or on clearly false and politically motivated charges.[93] In addition to these unlawful criminal proceedings and persecution of Al Jazeera journalists, the Egyptian military and police, and gangs acting in the interests of the military government, attacked the facilities of the media network in Egypt. Moreover, the media network itself underwent harassment and intimidation through the blocking of its transmissions and broadcasts and the closure of its offices and other facilities, while its broadcasting license in Egypt was cancelled and its local branch was subjected to compulsory liquidation.

Egypt's actions against Al Jazeera are clearly in breach of its obligations under the 1999 Egypt-Qatar BIT, which obliges the States to accord fair and equitable treatment to

[90] Al Jazeera Media Network v. Arab Republic of Egypt, ICSID Case No. ARB/16/1, pending. Case Details, available at: https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?CaseNo=ARB/16/1

[91] See available information about the Al Jazeera v. Egypt pending case at: http://investmentpolicyhub.unctad.org/ISDS/Details/700

[92] Press Release available at: http://www.carter-ruck.com/images/uploads/documents/AL_JAZEERA_EGYPT_-_(English)_Press_Release_-_27.01.16.pdf

[93] "Three Al Jazeera journalists, Peter Greste, Baher Mohamed and Mohamed Fahmy were sentenced to 7 years and more in prison in June 2014, with those convictions being confirmed in August 2015 following a protracted retrial. Peter Greste was re-convicted in absentia having been released from prison in February 2015 while Baher Mohamed and Mohamed Fahmy were pardoned and eventually released from prison on 23 September 2015, shortly before President Sisi was due to address the UN General Assembly in New York. Numerous other Al Jazeera journalists have been convicted by Egyptian courts in absentia; as with Mr Greste their convictions remain current and they have yet to be pardoned." (Press Release, 27 January 2016).

investors and treat the latter in a manner consistent with States' obligations under international law, and accordingly, international human rights law.[94]

It is apparent that the Al Jazeera media network has chosen an arbitration process in order to highlight the unlawful treatment of its journalists by Egypt's military rulers and as the only means against the politicized nature of Egypt's judiciary. Al Jazeera's international arbitration claim against Egypt is the only vehicle and investor-state arbitration the only effective forum to stand against human rights violations.

Alvarez argues that "[q]uite apart from the right to property, protecting the rights of investors may sometimes be hard to distinguish from protecting their human rights".[95] Dupuy, in the same vein, supports that there are "not only apparent but also clearly substantial similarities between the two sets of rights".[96] He recognizes a "deep entrenched relationship" between the FET principle and a series of basic human rights (the right to property, the right to a fair trial, and many others).[97] For instance, denial of justice may concern both issues of local remedies against administrative procedures and procedure before the national courts.[98] In other words, denial of justice clearly reflects human rights, the right to a fair trial and the right to an effective remedy.

However, Castillo draws attention to the concern expressed regarding the use of human rights arguments by the investor and the possible outcome of making human rights "artifacts of empowerment of foreign investors".[99] He argues that most of the rights provided by an investment treaty, designed to protect the investors, such as the FET standard, the NT and MFN clauses, the prohibition of discriminatory measures, the access to effective remedies (denial of justice), are related to rights of equality, the notion of justice and "have an argumentative burden in human rights even if it is not mentioned directly"; yet "are vaguely

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[94] See the international human rights conventions that Egypt has ratified, at: OHCHR, Human Rights by Country: Ratification Status for Egypt. Available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=54&Lang=EN

[95] Alvarez, J.E. (2011). *The Public International Law Regime Governing International Investment.* Hague Academy of International Law, at p. 462.

[96] Dupuy P. (2009), supra note 8, at p. 49.

[97] Id., at p. 52.

[98] Knoll-Tudor, I. (2009) The Fair and Equitable Treatment Standard and Human Rights Norms. In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 310- 343, at pp. 322-323.

[99] Castillo, Y. (2012). The Appeal to Human Rights in Arbitration and International Investment Agreements. *Anuario Mexicano de Derecho Internacional, vol. XII, 2012*, 47-84, México, D. F., ISSN 1870-4654, Universidad Nacional Autónoma de México-Instituto de Investigaciones Jurídicas, at p. 72.

worded and are themselves indeterminate".[100] So investors can strengthen even more their claims when they equip them with human rights argumentation.

The following Chapter 2.1.1. focuses on cases where the investors brought independent human rights claims before the arbitral tribunal. Then, Chapter 2.1.2. examines cases where the investors' human rights violations have been considered by the tribunals when deciding treaty violations, either after the investors' mere presentation of the facts that constituted the alleged violations of their rights (with no reference to international human rights law) (Chapter 2.1.2.1.) or after invocation of international human rights law by the investors, in more recent cases (Chapter 2.1.2.2.).

2.1.1. Investor's Independent Human Rights Claims

As we discussed briefly in Chapter 1.2.1., the majority of the IIAs limit the jurisdiction of the tribunal to "investment disputes" or to "alleged violations of the substantive rights in the investment treaty".[101] Consequently, the tribunal cannot extend its jurisdiction to other categories of disputes between the parties, and "the mere allegation of a human rights violation would not suffice to confer jurisdiction on a tribunal".[102] For this reason, the tribunals declined jurisdiction in a number of cases, where the investor brought before them independent human rights claims.

Namely, in the case of *Biloune v. Ghana* that concerned the arbitrary arrest and detention of the investor, and his subsequent deportation from Ghana to Togo without possibility of re-entry, although the investor had sought compensation for the violations of his human rights, the tribunal found that it lacked jurisdiction to address human rights violation claims, as an independent cause of action.[103] Specifically, while the tribunal affirmed that States are bound by customary international law to accord foreign nationals a minimum standard of treatment, it found that its jurisdiction under the investment treaty was limited to disputes 'in respect of an approved enterprise', according to Article 15 (2) of the applicable BIT. Thus, the tribunal, based on the interpretation of the treaty's compromissory clause, concluded that it had no competence to deal with every type of departure from the minimum

[100] Ibid, at p. 73.

[101] See Reiner, C. and Schreuer, C. (2009), supra note 3, at pp. 83-84, and De Brabendere, E. (2013); Grotious Centre Working Paper 2013/001-IEL; Leiden Law School Legal Studies Research Paper Series, at pp. 12-13.

[102] Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184-203, as cited in Reiner and Schreuer (2009), supra note 3, at pp. 83-84.

[103] Ibid.

standard or human rights violations and that an independent human rights claim fell beyond the scope of its jurisdiction.[104] Yet, the tribunal's position was that the investor's human rights' violations if and to the extent that affected the investment could become a dispute in respect of the investment and, thus, they were not excluded per se from its jurisdiction. The Tribunal, after rejecting the contentions of the Respondent that the arrest, detention and deportation of Mr. Biloune were justified, assessed these (human rights) violations as part of the actions that constituted a constructive expropriation of investor's company contractual rights in the project and, accordingly, an expropriation of the value of Mr. Biloune's interest in the company.[105] In other words, investor's human rights violations were evaluated by the tribunal as part of the expropriation claim.

In the case of *Channel Tunnel Group Ltd and France-Manche SA v. France and UK*, the claimants argued that the Respondent States, by failing to protect the undersea tunnel from clandestine migrants' multiple incursions and related delays, not only breached their obligations under the 1986 concession agreement and the BIT, but also their obligations deriving from the ECHR and Article 1 of its First Protocol regarding the right to protection of property.[106] By contrast, the UK argued that claims related to the application of the ECHR and its Protocol fell outside the scope of the applicable law and, as such, either fell outside the tribunal's jurisdiction or were inadmissible.[107] The tribunal's position was that "national and European law claims against the States are to be the subject of proceedings before the appropriate national or European forums. By contrast it is for the Tribunal to deal with disputes involving the application of the Concession Agreement".[108] Consequently, the tribunal stated that "the source and the only source of the Parties' respective rights and obligations with which the Tribunal is concerned is (a) the Treaty […] and (b) the Concession Agreement […]" and it concluded that it lacked jurisdiction to consider claims for breaches of obligations extrinsic to the Concession Agreement and the Treaty.[109]

Yet, two recent cases, the *Roussalis v. Romania* case and the *Al Warraq v. Indonesia* case, are declaratory of a change in investors' argumentation in support of their independent human rights claims brought before arbitration. In both cases, the individual investors

[104] Ibid.

[105] Case Summary of Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR pp. 209-10, as available at: http://www.biicl.org/files/3935_1990_biloune_v_ghana.pdf

[106] See Channel Tunnel v. UK and France, PCA, Partial Award, 30 January 2007, available at: https://pcacases.com/web/sendAttach/487 and Hirsch, M. (2009), supra note 2, at pp. 103-4.

[107] Channel Tunnel v. UK and France, Partial Award, at para 111.

[108] Id., at para 148.

[109] Id., at para 153.

provided novel arguments and interpretations in support of their independent human rights claims.

In the case of *Roussalis v. Romania*, the investor claimed that the tribunal could assert its jurisdiction over investor's human rights claims on the basis of the incorporation of the corresponding host State's human rights obligations into the investment treaty via its preservation of rights provision.[110] The preservation of rights provision reflects the general rule that the object and purpose of the IIAs is to improve the investment climate and not to reduce investor's rights and privileges accorded to him by other treaties or by the national legislation of the host State.[111] Dozler and Schreuer cite the relevant provision in the OECD Draft Convention:

> "Where a matter is covered both by the provisions of this Convention and any other international agreement, nothing in this Convention shall prevent a national of one Party who holds property in the territory of another Party from benefiting by the provisions that are most favorable to him."

Respectively, in Roussalis case, the preservation of rights provision in Article 10 of the applicable Greece-Romania BIT provided that:

> "If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement."[112]

Roussalis, based on Romania's ratification of the ECHR, supported that Article 1 of the First Additional Protocol to the ECHR[113] on protection of property provides far better treatment than Article 4 of the applicable investment treaty on expropriation and, as such, Article 1 of the First Additional Protocol comes within the jurisdiction of the tribunal. On that basis, Roussalis claimed both a violation of article 4 (1) of the applicable BIT and a violation of

[110] Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011 [hereinafter Roussalis award]

[111] See Dozler and Schreuer (2012), at pp. 190-1.

[112] Roussalis award, at para 117.

[113] Article 1 of the First Additional Protocol to the European Convention provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

article 1 of the First Additional Protocol to the ECHR.[114] Moreover, Roussalis supported that in view of the preservation of rights provision, the Romania's international obligations deriving from Article 6 of the ECHR, on the right to a fair trial, are also to be taken into consideration in that case.[115]

Contrary to investor's claim, the Respondent supported that "Claimant's personal rights do not arise 'directly out of an investment' within the meaning of Article 25 (1) of the ICSID Convention and [thus] fall outside the provisions of the Treaty, which protect 'investments' not 'investors'".[116]

The tribunal, in its assessment of Roussalis' novel argument, did not exclude the possibility that the Contracting States' international obligations, as mentioned at the preservation of rights provision could include obligations deriving from multilateral instruments to which those states are parties, including the ECHR and its Additional First Protocol.[117] In other words, the tribunal left open the possibility that a preservation of rights provision might give it authority to assert jurisdiction over certain human rights claims. Yet, the tribunal concluded that "the issue is moot" in that specific case and did not require a tribunal's decision, due to the higher and more specific level of protection accorded to the investors by the applicable BIT in comparison to the more general protections granted to them by the ECHR.[118] The tribunal, therefore, found that the preservation of rights provision, in that specific case, could not, in its own terms, serve as a useful instrument for enlarging the protections available to the investor from the host State under the investment treaty, and, finally, it denied the application of Article 6 of the European Convention and of Article 1 of the First Additional Protocol to Roussalis v. Romania case.

In the case of *Al Warraq v. Indonesia*, the Claimant alleged that the criminal proceedings conducted against him violated his human rights and supported that his human rights violations constitute a treaty violation. In other words, he brought his human rights claims before the Centre as independent claims, invoking the application of the principle of systemic integration. Specifically, he claimed for a violation of article 10 (1) of the applicable investment treaty (OIC Agreement)[119], under which the Respondent is obliged to abstain from undertaking any measures that directly or indirectly deprive the investor of his "basic rights", arguing further that Article 31(3)(c) of the VCLT provided that the basic rights and

[114] Roussalis award, at paras 112 and 115.
[115] Id., at paras 149 and 309.
[116] Id, at para 466.
[117] Id., at para 312.
[118] Ibid.
[119] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC Agreement).

guarantees accorded to him by virtue of the OIC Agreement must be interpreted to include basic international law rights and norms, and, thus, Claimant's human and civil and political rights as codified in international law.[120]

The tribunal approached the interpretation of "basic rights" in accordance with the general rule of VCLT and, taking into account that the object and purpose of the OIC Agreement was investment protection and protection by conferring a broad range of rights on investors, concluded that Article 10 (1) of the OIC Agreement, when is considered as a whole, refers to measures that affect the ownership or the existence of ownership rights over the investment.[121] According to the tribunal's interpretation, the term "basic rights" in Article 10 (1) "appears as part of an extended phrase relating to the ownership, possession, use, control, management and realization of benefits of capital". Thus, the tribunal held that the Claimant, having considered the term "basic rights" on a stand-alone basis, did not interpret it properly, and rejected the Claimant's submission that his right to a fair trial is guaranteed by the investment treaty.[122] At the end, the tribunal dealt with investor's human rights in its assessment of a violation of the FET standard.

As seen above, arbitral tribunals have consistently denied subject matter jurisdiction over human rights claims. However, taking into consideration the investors' cases presented above, we cannot but notice that in most recent arbitrations, the investors have been more daring and innovative in the ways of bringing their independent human rights claims before arbitration, and the tribunal's interpretation of the preservation of rights provision in *Roussalis* case is "a novel pathway for the introduction of human rights claims" before arbitral tribunals.[123] Yet, as Henin argues, that interpretation leaves space for acceptance of investors' independent human rights claims, while at the same time the arbitral tribunals remain reluctant to accept host States' human rights defenses.[124]

2.1.2. Investor's Human Rights in Support of Treaty Violations

As explained above, this Chapter examines investment disputes, where the investors' alleged cases involved violation of their human rights. These cases have been divided into two categories: cases where the investors' alleged case involved human rights violations but there

[120] AI Warraq v. Indonedia, Award, at para 177 and para 519.
[121] Id., at paras 520-521.
[122] Id, at para 522.
[123] Henin, P. (2013), at p. 247.
[124] Id., at pp. 269-270.

was no such reference by the investor - only mere exhibition of facts (2.1.2.1.), and cases where the investors invoked explicitly international human rights law to support treaty violations (2.1.2.2.). It is considered significant to present both cases, in order to identify the course of development of the human rights arguments made by the investors and appreciate their significance.

2.1.2.1.. Cases with no Reference to International Human Rights Law

We have already discussed how the Tribunal, in the case of *Biloune v. Ghana*, after rejecting the contentions of the Respondent that the arrest, detention and deportation of the investor were justified, assessed these human rights violations as part of the actions that constituted a constructive expropriation of investor's company contractual rights in the project and accordingly an expropriation of the value of Mr. Biloune's interest in the company.[125] In that case, there was no reference made by the investor to international human rights law.

In *Patrick Mitchell v. the Democratic Republic of Congo*, the dispute arose out of an intervention ordered by the Military Court of the host state, in execution of which the premises of investor's firm were sealed, documents, files and other items were seized, the employees of the firm were forced to leave the premises and two lawyers were captured and put into prison, remaining incarcerated for almost nine months.[126] The investor brought the dispute before the ICSID, claiming that the above governmental measures constituted an expropriation of his investment and seeking compensation for the damage suffered from the closing of the firm and the loss of clients as a consequence of the military intervention.

While both the seizure of property and the arbitrary detention of employees clearly raise human rights violations issues, there was no such reference made neither by the Claimant nor by the Tribunal.[127] The Tribunal concluded that the governmental measures, executed by the military authorities of the DRC, were tantamount to an expropriation of the Claimant's investment, discussing the arbitrary arrest of the employees as part of the 'dramatic circumstances', caused by the military intervention, that had as a consequence the total loss of the firm's clients.[128] In fact, the tribunal discussed the arrest of the two employees

[125] Case Summary of Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR pp. 209-10, as available at: http://www.biicl.org/files/3935_1990_biloune_v_ghana.pdf

[126] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Extracts of Award (English), 9 February 2004, at para 62.

[127] Reiner, C. and Schreuer, C. (2009), supra note 3, at p. 88.

[128] Mr. Mitchell v. Congo, Extracts of Award, at para 71.

as part of the expropriation, taking into account that since the detention lasted more than eight months, the expropriation could not qualify as being of an exclusively transitory nature.[129][130]

In *Desert Line Projects LLC v. the Republic of Yemen*, the dispute concerned, among others, allegations of arbitrary arrest and detention of the Claimant's personnel by the Yemeni army and failure of the host-state to provide protection and security from harassment, threats and theft by armed third parties.[131] The company claimed and won 'moral damages' for the 'stress and anxiety' that its personnel had suffered as a result of the actions and omissions of the host-state. The Claimant, as well as the tribunal, referred to the above incidents as "repeated attacks on the physical integrity of the Claimant's investment" and, finally, the tribunal found a violation of the fair and equitable treatment standard.[132] There was no reference to international human rights law; in fact there was no reference at all to "human rights".

In the *Loewen v. USA* case, the dispute arose from a private litigation in the Mississippi court instigated against Loewen, a Canadian investor, by its local competitor.[133] The claim brought before the arbitral tribunal was related to the alleged Loewen's unfair trial, during which the judge allowed the jury to be exposed to extensive xenophobic and racist comments by the local competitor's counsel, resulting in a verdict against Loewen.[134] The tribunal agreed that "the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant" and concluded that the trial and the verdict were clearly improper and contrary to minimum standards of international law and the FET

[129] The exact words of the tribunal being: "The arrest of two employees lasted more than eight months and Mr. Mitchell considered preferable to stay abroad waiting for the situation to improve in respect of his safety. The expropriation initiated by the intervention of March 5, 1999 has, therefore, not produced results that could be qualified as being of an exclusively transitory nature. The loss of clients was definitive.", at para 72 of the Extracts of the Award.

[130] It is worth mentioning that the decision of the Military Court that ordered, nine months later, the release of the two lawyers, stated clearly that their arrest was not justified. The State argued that yet the military intervention was justified by sufficient reasons to fear for the State security, related to "the risk that the product of the sale of the 99 tons of cassiterite would go to […], a company which was, in the view of the Congolese authorities, run by certain individuals with ties to the rebellion against the Government of the DRC" (Ibid, at para 74).

[131] Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008, at para 146.

[132] Desert Line v. Yemen, Award, the Claimant's contentions, at para 146 and the position of the tribunal, at para 185.

[133] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003.

[134] See Sattorova, M. (2012). Denial of justice disguised? Investment arbitration and the protection of foreign investors from judicial misconduct. *International and Comparative Law Quarterly, 61*(1), 223-246, at pp. 227-8.

standard.[135] The award had no specific reference to international human rights law and human rights courts jurisprudence, yet the tribunal noted "the duty imposed upon a State by international law to provide a fair and efficient system of justice" and "the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. Moreover, the tribunal stated that "it is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice". That States' positive obligation to ensure a fair trial and a fair and efficient system of justice, that the tribunal manifestly recognized, corresponds to the same positive States' obligations deriving from Article 6 of ECHR and from Article 14 of the ICCPR, that provide for the human right to a fair trial and its several constituent elements.

2.1.2.2. Cases with Extensive Reference to International Human Rights Law and Jurisprudence

A. The Rompetrol Group v. Romania: invocation of investor's rights under the ECHR

In the case of *The Rompetrol Group v. Romania*, investor's claims arose out of investigations undertaken by the National Anti-Corruption Office (PNA) and the Prosecutor's Office (GPO) with regard to the privatization of an oil refinery company, shortly after the sale of the controlling shares to the Claimant.[136] Specifically, the case concerned allegations of arrest, detention, travel-ban and wire-tapping of key company's executives. The investigations were based on alleged economic crimes, yet the Claimant argued that the governmental controls were oppressive, extraordinary and unreasonable.[137] The Claimant argued that the PNA conducted its investigation in "an abusive and non-transparent manner that amounted to unfair and inequitable treatment, in violation of Romanian law and Romania's international treaty obligations" while the GPO conducted its investigations in a manner "wholly lacking in transparency and in breach of … international standards of due process".[138] Following these allegations, the Claimant alleged that the actions of Romania constituted breaches of the FET and FPS standards and of the protection against unreasonable and discriminatory measures.[139]

[135] Ibid.

[136] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013 [hereinafter Rompetrol v. Romania, award]

[137] Id. at paras 39, 45-46.

[138] Id., at para 46 (b) and (c).

[139] Id., at para 53.

The significance of that case lies in the fact that both Parties referred extensively to and provided arguments based on ECtHR jurisprudence, regarding the critical issues of the interception of communications and the right to a fair trial. Namely, the investor, in support of its claims, argued that "the conduct of the investigations by the PNA intentionally circumvented procedural requirements by artificially maintaining in rem investigations" constituting a violation of its right to a fair trial and, especially, its right to be informed promptly of the nature and cause of the accusation against it (violation of the article 6 (3) (a) of the ECHR).[140] Moreover, the investor recurred to invocation of ECtHR judgments to support its submissions regarding, among others, the effect of bad faith on prosecution, the difference between the status of a prosecutor and that of a court, and the illegality of the interception of its executives' communications.[141]

The Respondent then, referred to ECtHR jurisprudence advancing the Claimant's arguments in its reverse form. Firstly, the Respondent argued that certain aspects of Romanian national law provide for a higher standard of protection than that of the ECHR and, secondly, claimed that if the Claimant was unable to establish a violation of the ECHR standard, then there could be no breach of the BIT standard.[142] The Claimant's view, against the Respondent's position, was that "human rights standards set a 'floor,' but not a 'ceiling' that would limit the level of protection that might be granted under the Treaty, so that ECHR case law can only be of assistance by analogy".[143][144]

Nevertheless, both parties considered the provisions of the ECHR as not directly applicable to the substantive dispute, yet the suggestion was that the Convention should be taken into account as relevant material for the treaty interpretation, according to article 31 (3) (c) of the VCLT.[145]

Still the most interesting part of the Award was the tribunal findings. The tribunal, after recognizing that both parties in their written and oral pleadings paid a great deal of

[140] Id., at para 54 (b).
[141] Id., at para 169.
[142] Id., at para 60 (d).
[143] Ibid.
[144] For a similar position to the Claimant's view, see Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, SCC No. 24/2007, Award, 20 July 2012, at para 22, where the tribunal stated that international investment treaties set more stringent standards than international human rights conventions, arguing that "human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them.".

[145] Rompetrol v. Romania, award, at para 169; See also previous Chapter 1.3. (B) *Systemic Integration of Human Rights by Resource to Article 31(3)(c) of the VCLT.*

attention to the relevance of the ECHR with regard to the proceedings before it and to the jurisprudence of the ECtHR, stated that "finds this to be the convenient place to address" the emerging subject.[146] To that end, the tribunal stated as 'elementary proposition' that:

> "… it is not called upon to decide any issue under the ECHR, whether the issue in question lies in the past or is still open. Its function is solely to decide, as between TRG [the Claimant] and Romania, "legal dispute[s] arising directly out of an investment" and to do so in accordance with "such rules of law as may be agreed by the parties," which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation. The ECHR has its own system and functioning institutional structure for complaints of breach against States Parties."[147]

Subsequently, the tribunal stated that the BIT and its standards of protection is the governing law for the issues that fall under the tribunal's competence, and it has no competence to decide issues with regard to the application of the ECHR within the Respondent State, either to individuals or to corporate entities. The tribunal also suggested that the Claimant could think of the possibility of bringing a claim before the ECtHR. Hereupon, the tribunal argued that the consideration of common standards under other international regimes, including the international human rights regimes, may be part, in appropriate circumstances, of the relevant materials that the tribunal uses for the appraisal of the violation or not of the FET standard, if and to the extent that these common standards can throw useful light on the content of FET in particular sets of factual circumstances.[148] Indeed, there are several cases where the tribunals willingly referred to and cited human rights jurisprudence in the course of interpreting the standards of protection accorded by the BIT or IIA.[149] [150]

The above statement by the tribunal was the necessary typical answer to the highly important question of competence. As Knoll-Tudor explains, a declaration of competence, by an arbitrator, to hear a human rights claim, may trigger the annulment of the award for an

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[146] Id., at para 168.

[147] Id., at para 170.

[148] Id., at para 172 (i), (ii) and (iii).

[149] See Reiner and Schreuer (2009), supra note 3, at p. 94, and Henin, P. (2013). Jurisdiction of investment treaty tribunals over investors' human rights claims: The case against Roussalis v. Romania. *Columbia Journal of Transnational Law, 51*(1), 76-90, at pp. 242-243.

[150] See, for instance, the case of Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras 116 and 122, where the tribunal cited ECtHR jurisprudence as authority in order to assess if the measures adopted by the State were an indirect de facto expropriation and if, then, these expropriatory measures were proportional to the public interest presumably protected.

excess of power.[151] Yet, following that declaration of non competence, as admitted above, the arbitral tribunal is expected to apply general international law.

Finally, though, the tribunal made a substantial observation regarding the specific case. The tribunal stressed that the Claimants in that arbitration were not the companies' executives bringing their claims before it as individuals, but the foreign company, a legal entity, and thus, the claims for decision were those of the company "which are qualitatively different in kind from whatever complaints there might be by individuals as to the violation of their individual rights" by the Respondent State.[152]

This observation could be seen as recognition of a different treatment that individuals could have if bringing claims before the Centre for their human rights violations. In the same vein, Isiksel argues that "while it might make sense to protect the corporate entity by attributing to it the legal rights necessary for performing its social functions (including profitmaking), these cannot include the human rights of individual corporators, which belong to them by virtue of their humanity and are nontransferable".[153]

B. Pey Casado v. Chile: invocation of investor's rights under the ECHR

A remarkable ICSID case, in the information and communication sector and more specifically, in the field of publishing activities, is the *Pey Casado and President Allende Foundation v. Chile* case, one of the longest running ICSID cases, given the fact that the Claimants initiated ICSID proceedings seeking damages already in 1998.[154] The facts underlying the case go back to 1973, September 11th, the day of the overthrow of Chile's President Allende, when the military occupied and seized the premises, including papers and equipment, of "El Clarin" -a newspaper of left-wing political orientation and President Allende's strong supporter, and detained its director and part of its personnel.[155] Consequently, in execution of a decree-law that declared illegal and dissolved all parties, entities, groups, factions and movements of Marxist ideology as well as the associations,

[151] Knoll-Tudor, I. (2009) The Fair and Equitable Treatment Standard and Human Rights Norms. In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 310- 343, at p. 336.

[152] Rompetrol v. Romania, award, at para 172 (iv).

[153] Isiksel (2016), supra note 11, at p. 322.

[154] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008.

[155] Ibid, at para 70 and Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Resubmission Proceeding, Award, 13 September 2016, at para 5.

communities or companies of any nature that either directly or through third parties belonged to or were directed by one of them, the assets of the Claimants' company passed to the State, remaining under the complete control of the military until their formal confiscation.[156] In the aftermath, there were a series of facts and continuous illegal actions, as the Claimants alleged.

The Claimants brought before the Centre claims for a creeping expropriation and a denial of justice in violation of the Chile-Spain APPI (Accuerdo para Proteccion y Promotion de Inversiones). The Claimants made references to ECHR jurisprudence to support both claims. One of the aspects of the alleged denial of justice was the impossibility of obtaining a decision, with regard to the illegal expropriation of Claimant's investments, at first instance national court after seven years of proceedings.[157] [158] The tribunal had to address if the absence of a final decision by the Chilean courts during a period of seven years (1995-2002) constituted a denial of justice and if the investments of Pey Casado had been granted a fair and equitable treatment according to APPI provisions. Indeed, the tribunal recognized that extraordinary long procedural terms constitute one of the typical forms of denial of justice.[159]

The tribunal referred to European Court of Human Rights jurisprudence to amplify its argument. The tribunal argued that the ECtHR has also ruled in the same vein, considering that the period of seven years that the national courts took to examine a compensation claim after an expropriation exceeded a reasonable period of time, which constitutes a violation of article 6 of ECHR, a violation of the right to a fair trial, the right to be heard within a reasonable time, enshrined among the fundamental human rights.[160]

C. Al Warraq v. Indonesia: invocation of investor's rights under the ICCPR

The tribunal in its award in the case of *Al Warraq v. Indonesia* provided an essential analysis on two issues regarding the relationship between IIL and IHRL: a) the issue of tribunal's competence over standalone human rights claims vs. tribunal's use of IHRL as a tool for FET interpretation, and b) the possible different evaluation and outcomes with respect to binding

[156] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008, at para 589 and Award, September 2016, at para 7.
[157] Ibid, at para 624.
[158] Another aspect of the alleged denial of justice was the denial of "the right to access to international arbitration". The Claimants, in support of this claim, pointed to specific facts between 1997 and 2002 (in chronological order): the opposition of Chile to the registration of the request for arbitration; the request made by Chile to the Spanish government to modify, on the pretext of interpretation, the content of the APPI invoked by the Claimants in the request for arbitration; the order given by the Ministry of Interior to modify the inscription that qualified Pey Casado as a foreigner in the Chilean Civil Registry; the resolution of the Chilean Legislative Power declaring that the State will not execute an unfavorable arbitration decision; the rejection of the appeals admitted by Pey Casado. Ibid, at para 644.
[159] Ibid., at paras 658-9.
[160] At para 662.

IHRL and non-binding IHRL in investor-state arbitration. Moreover, the magnitude and singularity of the specific award lies in the fact that the Claimant supported his claim by invoking his human rights and citing extensively international human rights bodies' jurisprudence, and the tribunal, in its decision, analyzed respectively the relevant to the claims international human rights law provisions.[161]

The case of *Al Warraq v. Indonesia* concerned claims of investor's mistreatment in criminal proceedings, investigation and prosecution, conducted by the host-state authorities, in the aftermath of a bank bailout.[162] Namely, the Claimant alleged that the criminal proceedings conducted against him violated his human rights, and specifically, the right to the presumption of innocence and other several constituent elements of the right to a fair trial, including the right to be informed promptly of charges, the right to be tried in his presence and to defend himself in person or through legal assistance of his own choosing and the right to his conviction and sentence being reviewed. He claimed that the above alleged human rights violations resulted from the media statements made by Indonesian authorities before the criminal case was conducted, the State's 'nefarious motive' for his prosecution and conviction to pursue his assets, the failure of the authorities to summon him properly to attend the criminal trial and his later trial in absentia. The Claimant, in support of the above, invoked, apart from the ICCPR, the American Convention on Human Rights, the European Convention of Human Rights, the African Charter on Human and Peoples' Rights, General Comments of the UN Human Rights Committee regarding the right to presumption of innocence and the Universal Declaration of Human Rights.[163]

As it as discussed earlier, the interesting dimension of the Claimant's case was that the Claimant supported that the violation of his right to a fair trial constituted a treaty violation, bringing his human right violation before the Centre as an independent claim.[164] Yet, the tribunal considered the Claimant's interpretation wrong and rejected the Claimant's submission that his right to a fair trial is guaranteed by the investment treaty.[165]

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[161] See the analysis of Cotula, L. (2016), supra note 5.

[162] Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014 [hereinafter Al Warraq v. Indonesia, award].

[163] The investor claimed that his right to the presumption of innocence is affirmed in Article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR)[163], citing further extensively IHRL and international human rights bodies and courts jurisprudence, that applied article 8 (2) of the ACHR, article 6 (2) of the ECHR and article 7 (1) (b) of the African Charter on Human and Peoples' Rights, that all provide for the right to be presumed innocent until proved guilty. See at paras 179-181.

[164] See Chapter 2.1.1. *Investor's Independent Human Rights Claims.*

[165] Al Warraq v. Indonesia, award, at para 522.

Then, the tribunal dealt with Claimant's contention that his rights guaranteed by the ICCPR form an element of the FET standard, discussing thoroughly the ICCPR and its relevance to the FET standard.[166] The tribunal stated that the ICCPR is regarded as "a part of general international law" and, most importantly, it contains binding legal obligations for the States parties to it, concluding that, Indonesia in breach of its binding legal obligations, as party to ICCPR, failed to accord a fair and equitable treatment to the investor. The tribunal also, in order to reinforce its position, mentioned that there is no doubt that the obligations deriving from the ICCPR are binding, contrary to the existing disagreement over the nature of human rights obligations under the UN Charter and UDHR.[167]

D. Amto v. Ukraine, Yukos v. Russia: parallel proceedings before the ECtHR

In the cases of *Amto v. Ukraine* and *Yukos v. Russia*, the investors invoked their rights under the ECHR, yet, the interesting part, discussed below, was that the existence of parallel proceedings before the investment arbitral tribunal and the ECtHR.

In the case of *Amto v. Ukraine*, the tribunal had to address the issue of the existence of a parallel international proceeding before the ECtHR and Respondent's relevant objection to arbitral tribunal's jurisdiction.[168] Namely, the EYUM-10, a closed joint stock company registered in Ukraine, submitted against Ukraine an application to the ECtHR based on alleged violations of the ECHR. As the Claimant before the arbitral tribunal, AMTO, was a shareholder of EYUM-10, Ukraine requested that the arbitration be terminated or suspended due to the parallel proceedings before the ECtHR, arguing that "the doctrine of *lis pendens* should be applied flexibly to avoid international proceedings concerning the same events and similar claims, even if the parties and the respective causes of actions are formally different".[169] On the other hand, AMTO argued that the parties to both proceedings, before the SCC and ECtHR, were different and so was the legal basis or cause of action for the respective proceedings, thus, EYUM's application to the ECtHR was not a ground for termination not suspension of the arbitration before SCC, since EYUM-10, the Claimant in the ECtHR proceeding, was not a party to investment arbitration before SCC. Moreover, AMTO supported that the ECHR proceeding concerned Ukraine's violations of the ECHR, while AMTO's claims were based on the ECT and, consequently, a ruling by the ECtHR

[166] Id., at paras 556-621.

[167] Id., at para 559.

[168] Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award, 26 March 2008 [hereinafter AMTO v. Ukraine, Award], at para 71.

[169] Ibid.

would not have *res judicata* effect in the SCC arbitration. Ukraine had also raised the issue of a risk of double recovery in support of its jurisdictional objection.

The tribunal rejected Ukraine's *lis pendens* objection, arguing that although an international tribunal and a supra-national court had concurrent jurisdiction over a dispute arising out of similar facts, the parties and the causes of action were indeed different in these two proceedings (EYUM-10 was not a party to the arbitration and AMTO was not a party to the ECtHR proceedings; the SCC arbitration was based on alleged breaches of the ECT, while proceedings before the ECtHR were based on alleged violation of Article 6 (1) of the ECHR and Article 1 of its First Protocol).[170]

Similarly, in the case of *Yukos Universal Limited v. Russia*, the tribunal had to deal with a parallel proceeding before the ECtHR and the Respondent's objection to tribunal's jurisdiction over disputes submitted to the ECtHR, at two different stages: at the first stage, the proceedings before the ECtHR were pending; at the second stage the ECtHR had already issued a judgment.[171] At the first stage, Russia argued that the Claimants before the ECtHR proceedings owned and controlled the Claimants before the PCA and that the complaints brought before the ECtHR contained allegiations that overlapped with those raised in PCA proceedings, contrary to the fork-in-the-road clause contained in the investment treaty that precluded these investors from re-litigatinf in investment arbitrations disputes that had already submitted to the ECtHR (or to a Russian court).[172] Moreover, Russia raised the issue of the shareholder's ability to file a claim for violation of the company's rights, arguing that both the host State domestic law and the ECtHR jurisprudence do not permit a shareholder's claim for injury to a company.[173]

Yuko's argument – the same as AMTO's argument – was that it was not a party in any of the proceedings before the ECtHR and that, in any circumstances, the ECtHR proceedings did not concern alleged breaches of the ECT, so the Respondent had no grounds to rely on the fork-on-the-road provision.[174] Finally, the tribunal, in its interim award on jurisdiction and

[170] Ibid.

[171] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227. Interim Award on Jurisdiction and Admissibility, 30 November 2009 [hereinafter Yukos v. Russia, Interim Award on Jurisdiction and Admissibility] and Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 [hereinafter, Yukos v. Russia, Final Award].

[172] Yukos v. Russia, Interim Award on Jurisdiction and Admissibility, at para 53.

[173] Id., at para 363.

[174] Id., at para 594.

admissibility, found Respondent's arguments unconvincing, concluding that the applications to the ECtHR failed to trigger the "fork-in-the-road provision" of the ECT.[175]

At a subsequent stage of the arbitral proceedings, Russia reopened the issue of tribunal's jurisdiction, on the basis that the ECtHR issued a judgment in its *OAO Neftyanaya Kompaniya Yukos v. Russia* case, which addressed the "same circumstances" on which the Claimants' claims before the PCA arbitration were based, and rejected Claimants' claims that Russia's taxation measures against Yukos were mala fides.[176] Russia argued that the ECHR and the ECT claims shared "the same fundamental basis", both aimed to obtain compensation for the purported expropriation of Yukos, and, accordingly, the ECT claims should be dismissed, stressing again its argument, as previously submitted in its First Memorial on Jurisdiction and Admissibility, that host State's consent to submit a dispute to international arbitration was expressly conditioned on investors not having already submitted the dispute to a "previously agreed dispute resolution procedure".[177] Moreover, Russia insisted that the tribunal's dismissal of its jurisdictional objection (in the interim award) was based on the "incorrect assumption" that the parties in the proceedings before the ECtHR and the arbitral proceedings were different. More specifically, Russia referred to a series of similarities between the parties and the causes of action of the parallel international proceedings, arguing, inter alia, that the ECtHR were instituted under Yukos' direction and control and involved the "very same economic interests" that were represented in the arbitral tribunal.[178] For all above reasons, Russia also raised the issue of "a risk of conflicting determinations".[179]

Finally, the tribunal, in its final award, despite the new element of the ECtHR judgment, found no reason to reopen the issue of its jurisdiction and change its decision, and it dismissed Russia's new objection.[180]

Both tribunals, in *AMTO v. Ukraine* and in *Yukos v. Russia*, rejected Respondents' jurisdictional objections, based on invocation of *lis pendens* and the fork-on-the-road

[175] Id., at para 598; The ECtHR had also ruled in the same vein, noting that "despite certain similarities in the subject-matters of the present case and of the arbitration proceedings, the claimants in those arbitration proceedings are the applicant company's shareholders acting as investors, and not the applicant company itself, which at that moment in time was still an independent legal entity" (para 524) and, concluding that:"[i]n these circumstances, the Court finds that the parties in the above-mentioned arbitration proceedings and in the present case are different and therefore the two matters are not "substantially the same" within the meaning of Article 35 § 2 (b) of the Convention. It follows that the Court is not barred, pursuant to this provision, from examining the merits of this case." (para 526). OAO Neftyanaya Kompaniya Yukos v. Russia, ECtHR Case - Application no. 14902/04, Judgment 20 September 2011 (Final 08/03/2012).

[176] Yukos v. Russia, Final Award, at para 33.

[177] Id., at para 1260.

[178] Id, at para 1261 and 1268.

[179] Id, at para 1270.

[180] Id, at paras 1271-1272.

provision respectively, due to the existence of a parallel proceeding before the ECtHR. The tribunals found that in both cases the parties in the parallel proceedings were different; formally yes but essentially they were not. It is obvious that a corporate entity seem to have a lot of avenues to seek compensation for the same injury either by claiming damages before an arbitral tribunal for alleged violations of the investment treaty or by claiming reparation before the ECtHR for alleged violations of the ECHR, using different Claimants to initiate different proceedings: the Corporation itself, its shareholders as individuals, or corporations that the Corporation controls.

2.1.2.3. Further Considerations

The *Al Jazeera v. Egypt* case and the *Pey Casado v. Chile* case cannot but shed light on the media disputes taken to investor-state arbitration. Indeed, there are a growing number of international investor-state arbitrations arising out of media disputes.[181] Although the majority of them yet are commercially-oriented, relating mostly to broadcasting licensing refusals and tax impositions, there are, interestingly, also media disputes that arose after politically-motivated expropriations of media outlets during *coups* d' état in the host-state, alleged discrimination or even persecution, by means of arbitrary arrest and detention and unfair trial, against journalists and publishers who either support political opposition or impart information non convenient for the government.[182] In such circumstances, the foreign investor can argue that these actions constitute an expropriation and/or violation of the FET and FPS standards. Furthermore, in support of these treaty violations, the investor could reinforce its case by invoking its right to freedom of expression (besides the right to a fair trial).[183]

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[181] See Peterson, L.E. (2010). International Investment Law and Media Disputes: A Complement to WTO Law. *Transnational Corporations Review Vol. 2, No. 1, 2010*, 9-12. Available at: http://www.tnc-online.net/pic/20100504200604922.pdf

[182] Ibid.

[183] Article 10 (1) of the ECHR provides that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." As media enterprises are explicitly mentioned in Article 10, as a practical matter, it has been uncontroversial that legal persons are included within this right. Moreover, the term 'everyone' in the relevant article was interpreted by the Court to mean that it includes all legal persons. Scolnicov, 2013, at pp. 3-4; In Glas Nadezhda EOOD and Elenkov v. Bulgaria case and Meltex Ltd and Mesrop Mousesyan v. Armenia case, the court found a violation of article 10 of the ECHR – violation of the right to freedom of expression, because there was no sufficient transparency in the process upon which the broadcasting license had been denied. Namely, in Meltex v. Armenia, the ECtHR considered that a broadcasting license process, whereby the authority granting or denying the licenses gives no complete reasons for its decisions, "does not provide adequate protection against arbitrary interferences by a public authority with the fundamental

These cases can be quite representative of the role of international investment protection and IIAs' potential impact to advance freedom of the media, and above all freedom of expression, especially during times of political upheavals and social unrest in the host-states.[184] The FET and FPS standards, although not directly aimed at the protection of expressive rights, can be used to protect foreign individuals and foreign-controlled organizations from host state actions designed to limit freedom of expression, and thus, promote a human rights framework besides the economic character of investment protection.

Furthermore, in the same vein, the promotion of a human rights framework besides the economic character of investment protection can be considered through the possible extension of IIAs' protection to NGOs. Alvarez discusses the possibility of BITs and FTAs extending their protection to foreign enterprises whether or not they operate for a profit; an example could be the offices of Amnesty Internaitonal located abroad.[185] He argues that many investment treaties appear to extend their protection and he notes that "[g]iven the recent tendency of many Governments to regulate in order to limit the activities of NGOs within

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right to freedom of expression" and namely the applicant company's freedom to impart information and ideas.[183] Moreover, the ECtHR concluded that as the denial of the broadcasting license was not lawful, there was no need to further determine whether the public authority's interference was justified by a legitimate aim nor whether it was proportionate to the aim pursued. CASE OF MELTEX LTD AND MESROP MOVSESYAN v. ARMENIA (Application no. 32283/04) JUDGMENT, 17 June 2008, Final 17/09/2008, at paras 83-84; See also Jan Oster (2015). *Media Freedom as a Fundamental Right.* Cambridge University Press.

[184] Peterson, L.E. (2010); See also the *Tokios Tokeles v. Ukrania* case: the case concerned an investment in the information and communication sector, publishing activities. The investor owned a prospering business in Ukraine in the advertising, printing and publishing trades. The Claimant alleged that its Ukrainian subsidiary company was subjected to a sustained campaign of oppression by Ukrainian state agencies, which was instigated clearly for political reasons, and specifically due to a Claimant's publication supporting an Ukrainian opposition politician. The Claimant argued that Ukrainian state agencies implemented various measures against his investment motivated by their illegitimate political goal of punishing the Claimant for supporting Yulia Tymoshenko. The oppression took place in the form of numerous episodes of unjustified interference with the business' activities and management, mostly by the Kiev tax administration but also with the prosecution and judicial organs' complicity, under the guise of investigations into investor's alleged breaches of Ukrainian economic laws. The investor claimed that the above illegal campaign against his investment had such a great effect on his business, customer relations and staff welfare as to constitute an illegal expropriation of his investment, a breach of Ukraine's obligation under the Ukraine-Lithuania BIT to provide fair and equitable treatment and at the same time a breach of the Ukrainian (host-state) laws. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, 26 July 2007.

[185] Alvarez, J.E. (2011). *The Public International Law Regime Governing International Investment.* Hague Academy of International Law, at pp. 461-2.

their borders, environmental and human rights NGOs may need the assistance of a BIT to protect their own interests, including their property, abroad".[186]

2.2. ENVIRONMENTAL ARGUMENTS IN SUPPORT OF INVESTORS' CLAIMS: THE *PETER ALLARD v. BARBADOS* CASE

Environmental non-governmental organizations, the host-state local communities affected by the investments and part of the academic community denounce the current international investment regime, arguing that it works against national environmental policies. Against the fear that ISDS could undermine environmental protection or prevent the adoption of new environmental measures by the host-states, Annette Magnusson, the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), supported that ISDS can be used as an effective tool to enforce environmental protection laws in case the host-states fail to effectively enforce them.[187] In the same vein, Nikos Lavranos, legal expert on international arbitration and investment law and Secretary General of of the European Federation for Investment Law and Arbitration (EFILA), thinks of investment arbitration and environmental protection as "a double-edge sword".[188]

Responsible for this latest and ongoing discussion in the international investment arbitration world was the *Peter Allard v. Barbados* case, in which the investor introduced first a novel in investor-state arbitration argument.[189] The case had been well known and had triggered a discussion before the release of the PCA award, which was not previously than June 2016; until then the discussion had been taking place without knowledge of the award, yet the claim *per se* was the significant part.[190]

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[186] Ibid.

[187] See the speech by Annette Magnusson, SCC Secretary General, *How the investment protection regime can contribute to a better environment*, in Roundtable: Challenges and Future of Investment Arbitration , Warsaw, 29 May 2015.

[188] Nikos Lavranos (November, 9, 2015). *Investment Arbitration and Environmental Protection: A Double-Edge Sword*, Kluwer Arbitration Blog, available online at: http://kluwerarbitrationblog.com/2015/11/09/investment-arbitration-and-environmental-protection-a-double-edged-sword/#comments

[189] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06. Award, 27 June 2016 [hereinafter Peter Allard v. Barbados Award].

[190] The Notice of Investment Dispute was delivered to the government of Barbados on May, 2009 and the Award on Jurisdiction was issued on June 13, 2014. See the relevant documents of the case available in: http://www.italaw.com/cases/4327

Hereunder, after the facts and main positions of both parties presentation (A), I will focus on the parties' and the tribunal's positions with regard to the relevance of State's obligations under international environmental treaties to the FET and FPS standards (B and C, respectively), and the tribunal's consideration of the existence of a wider group of stakeholders in the critical area of the alleged environmental degradation (D). Finally, I make some concluding remarks based on the award and possible future investors' claims based on environmental-human rights arguments (E).

A. The Facts and the Parties' Positions

The dispute concerned Mr. Allard's investment in the acquisition and development of an eco-tourism site in Barbados (the Sanctuary).[191] The Sanctuary was a bird and nature reserve, which included a forest of red and white mangroves, a lake and ponds connected to the ocean with a water canal (the Sluice Gate). The investor had followed all the required steps to obtain the planning permission, including an Environmental Impact Assessment which highlighted "the asserts of the development, the areas of concern, the issues to be addressed and an environmental management plan for the wetland"[192]; the Sanctuary, finally, opened to the public in 2004.[193] One year later, a failure at the South Coast Sewage Treatment Plant, operated by Barbados Water Authority, resulted in the emergency discharge of raw sewage into an area of some 240 acres of wetlands on the south coast of Barbados (Graeme Hall Swamp), within which the Sanctuary was located.[194]

The investor claimed that the host-state "failed to take reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of the Claimant's eco-tourism site, thereby destroying the value of his investment", violating by actions and omissions the Canada-Barbados BIT.[195] Namely, the Claimant argued that "the actions and inactions of Barbados concerning the mismanagement of the Sluice Gate and other issues, caused and/or failed to mitigate a significant degradation of the environment" and obliged him to close the Sanctuary, which could no longer qualify for an eco-tourism attraction and a 'tourist experience', thereby depriving him of the entire benefit of his investment in the host-state.[196] The investor claimed

[191] Id., at para 33.
[192] Id., at para 35.
[193] Id., at para 42.
[194] Id., at para 43.
[195] Id., at para 3.
[196] Id., at para 50.

for a violation of the FET and the FPS standards and an indirect expropriation of its investment.

The host state in its defense supported that the investor closed the eco-tourism site for business reasons unrelated to environmental conditions, that during the critical period no environmental degradation occurred and, alternatively, that if any degradation took place was due to external causes and the investor's own actions and omissions, while the State took all appropriate measures to protect the environment and the investment.

Before moving on to the parties' and tribunal's position with regard to the alleged violations of the FET and FPD standards (elements B and C), we should have in mind that the tribunal, before dealing with the alleged BIT violations, first examined if there was actually a degradation of the environment and an actual deterioration of the water quality at the Sanctuary during the critical period, and it concluded that the Claimant failed to demonstrate that an environmental degradation did occur. Additionally, the tribunal supported that even if it had been persuaded that there was an environmental degradation during the critical period, there was no proof provided that such degradation was caused by the mismanagement of the state authorities.[197] Therefore, the tribunal found that, in any circumstances, the investor's claim failed at its factual threshold, because the investor failed to prove that the alleged loss or damage to his investment could be attributed to any actions or omissions of the host-state.

B. State's Obligations under Environmental Treaties & Investor's Legitimate Expectations

The applicable BIT accorded to the investor "a fair and equitable treatment in accordance with principles of international law". According to the Claimant, the FET standard of the applicable BIT included the protection of "the investor's reasonable expectations arising from the commitments of the host state".[198] [199]

[197] Id., at paras 164-165.

[198] Id., at para 170.

[199] Dozler and Schreuer, in an evaluation of the arbitral tribunals' practice, conclude that the FET standard may include the stability and the protection of the investor's legitimate expectations, transparency, compliance with contractual obligations, procedural propriety and due process, good faith and freedom from coercion and harassment. Specifically, with regard to the investor's legitimate expectations, they write that they "are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state. The legal framework on which the investor is entitled to rely consists of legislation and treaties, assurances contained in decrees, licences, and similar executive statements, as well as contractual undertakings […] Tribunals have emphasized that the legitimate expectations of the investor will be grounded in the legal order of the host state as it stands at the time the investor acquires the investment." Dozler and Schreuer (2012), at pp. 145- 160; Knoll-Tudor writes that "[a] foreign investor should be aware of a certain number of elements concerning the host state when he or she decides to make an investment. These elements should be taken into account by the investor not only when he or she decides to invest in one country rather than in another, but also in the every-day contact with the state and its administration. If evaluated correctly, these elements contribute to the formation of a set of expectations which is legitimate and only these legitimate expectations receive

The investor claimed that the host state made representations that it would maintain the water canal (the Sluice Gate) and generally "uphold its environmental policies, particularly those that reflected a commitment to conservation and protection of the biodiversity of the Sanctuary" and, then, it failed to act in accordance with those representations.[200] Moreover, the investor argued that the control, operation and maintenance of the canal was "inherently a matter of public authority" as located on state and not private land and its operation affects all the surrounding areas of which the Sanctuary was just a part.[201]

The investor argued that the FET standard, and his legitimate expectations respectively, should be interpreted according to Article 31 (3) (c) of the VCLT, thus, the applicable BIT should be interpreted within the context of any relevant rules of international law applicable in the relation between the parties, including the environmental treaties to which the host-state is a party, and the host-states' environmental obligations deriving from them.[202] Namely, the investor made reference to the United Nations Convention on Biological Diversity and the Ramsar Convention on Wetlands of International Importance, in accordance with which the host-sate has designated the state area, within which his investment was located, as a "wetland of international importance".[203] He argued that taking into account Barbado's environmental treaty obligations, his expectations were reasonable and, in addition, that Barbados' environmental treaty obligations reinforced the specific representations made by the host-state regarding the protection of the biodiversity of the Sanctuary.[204]

The Respondent supported that, first of all, the tribunal has no jurisdiction to consider alleged breaches of international environmental treaties.[205] Secondly, the Respondent argued that the tribunal should apply Article's 1105 (1) of NAFTA rule according to which a breach of any other treaty does not amount to a breach of the FET standard. Thirdly, Barbados ratified the Ramsar Convention after investor made his investment.[206] Finally, in any

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protection from international law" Knoll-Tudor, I. (2009) The Fair and Equitable Treatment Standard and Human Rights Norms. In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 310- 343, at p. 326; Regarding the extent of protection of legitimate expectations, see also Tellez, F.M. (2012). NOTE: Conditions and Criteria For the Protection of Legitimate Expectations Under International Investment Law, *ICSID Review, Vol. 27, No. 2 (2012)*, 432-442, at pp. 435-7.

[200] Peter Allard v. Barbados, Award, para 172.
[201] Id., at para 175.
[202] Id, at para 177.
[203] Id, at para 178.
[204] Id., at para 198.
[205] Id, at para 190.
[206] Id, at para 190.

circumstances, the host-state supported that it complied with its obligation under these treaties.

Surprisingly and disappointingly enough, the tribunal made no reference to the international environmental treaties, apart from restating which was the Claimant's position with regard to these. Yet, it took no position on that issue. It moved straight to the conclusion that it found no specific and direct representations made by the Respondent State capable of creating legitimate expectations on the part of the investor that the host-state would take any specific measures towards the environmental protection of his investment or the maintenance and operation of the water canal.[207]

The tribunal considered that an essential element of a claim of a FET standard breach based on the notion of legitimate expectation is the reliance by the investor on the host state's representations.[208] Yet, the tribunal explained that "the reliance criterion requires that the investor's decisions to invest be made in reliance on representations made to him by the State, including both his initial investment decision and also further investment decisions, such as a decision to inject additional capital into an ongoing project."[209]. The tribunal particularly noticed that the investor had moved to the purchase of the first and second parcels of the Sanctuary and commenced its development before even submitting an Environmental Management Plan (EMP) for approval, against the state authorities' advice and warnings.[210] Moreover, the third parcel was acquired, although the first EMP has been rejected and before the submission of the Amended EMP. The tribunal, therefore, concluded that the investor began the development of the project before the approval of the Amended EMP, despite his own initial view and proposal that a correct ecological operation of the canal is a necessity for the protection of the wetland.[211] The tribunal, thus, found no violation of the FET standard.

C. The FPS Standard with regard to State's Environmental Obligations

The investor supported that the FPS standard obliged the host-state to exercise due diligence in order to "protect investments against injury by private parties," requiring "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise," without "any need to establish malice or negligence," and that furthermore, the host state's obligations under the international environmental treaties

[207] Id., at paras 199 and 216.
[208] Id., at para 217.
[209] Id., at para 218.
[210] Id., at para 224.
[211] Id., at para 225.

heightened the level of the required due diligence.[212] The investor claimed that the host-state failed to provide him full protection and security by not enforcing its environmental laws and not taking reasonable steps to protect its investment, despite being aware of the possible environmental damage to the investment and despite of the investor's repeated offers of financial and technical assistance.[213]

However, the tribunal found that the host state took reasonable steps to protect the investment.[214] The tribunal, by citing the argumentation in *El Paso v. Argentina* award[215], argued that the State's obligation to provide an investment with full protection and security "is not one of strict liability, but of "due diligence" or "reasonable care".[216] That State's obligation is, therefore, limited to reasonable action and it does not involve that the host state is obliged to take any specific measures upon investors' requests.

The tribunal clearly stated that "[t]he fact that Barbados is a party to the Convention on Biological Diversity and the Ramsar Convention does not change the standard under the BIT, although consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances".[217] The tribunal found no violation of the FPS standard.

D. The Tribunal's Considerations over the Existence of a Wider Group of Stakeholders

An interesting part of the award is the tribunal's recognition, and relevant considerations, of a wider group of stakeholders in the critical area - apart from the investor, and the effects that a possible 'invasive' State's measure to protect the Claimant's investment would have on them.[218] The tribunal, assessing the experts analysis presented during the proceedings, concluded that "the Sluice Gate's operation would affect the Sanctuary, the surrounding lands [with a negative impact on the coral reefs and water quality], including government lands, as well as the public beach" and the availability of adjacent tourist and public uses of the sea and its beaches. The tribunal found that it was no easy for the host state authorities to administer the general environmental issues in the interests of all the stakeholders, and that under that

[212] Id., at para 230.
[213] Id., at para 232.
[214] Id., at para 242.
[215] "…the obligation to show "due diligence" does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is "reasonable or "due", depends in part on the circumstances" in El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011, at para 523.
[216] Id., at para 243.
[217] Id., at para 244.
[218] Id., at paras 247-248.

circumstances, the host state took the appropriate and sufficient steps for purposes of its duty of due diligence.[219]

E. Concluding Remarks and Further Considerations

The Peter Allard v. Barbados, as far as we know, is the first arbitration where a claimant invoked the State's obligations to protect the environment in support of his claims of BIT violations. The tribunal did not give any answers and did not provide any analysis regarding the relevance of State's obligations under international environmental treaties to the investor's legitimate expectations and FET standard protection, despite the fact that both parties took position regarding this issue. Yet, the tribunal took a clear position, when addressing a violation of the FPS standard. It explicitly stated that the State's obligations under the international environmental treaties do not change the FPS standard under the BIT, meaning that they do not heighten the standard, admitting though that a consideration of a host state's international obligations may well be relevant in the application of the standard to particular circumstances, without elaborating further on this argument.

However, the tribunal justified its general position and its poor reasoning on the critical issues, on the fact that the Claimant failed to demonstrate an environmental degradation and any loss or damage to its investment. Yet, in effect, the tribunal cloaked itself behind that explanation and avoided a profound analysis with regard to State's environmental treaty obligations and the possible impacts of its non compliance to international environmental law on an investment. On the other hand, tribunal's considerations over investor's earlier behaviour and environmental (no) concerns (as facts that weaken investor's environmental argumentation) along with the considerations over the existence of a wider group of stakeholders and their rights on the critical area demonstrate a strict position against investor's environmental claims -suggesting share responsibilities between investors and host states – and a balanced approach, respectively.

The specific case, considering the character of the investment (en eco-tourism site), contrary to, for instance, mining and oil megaprojects, and the alleged environmental degradation due to host State authorities' maladministration, provided some suitable grounds for such considerations and analysis. It would be interesting to see if there will be more investors' environmental arguments in future arbitrations and in what type of cases might be those arise.

[219] Id., at para 249.

While, n principle, environmental provisions, and environmental policies in general, are designed for the protection of the environment and individuals' human rights, not the investments, which would be the case with regard to an investment that aims at fostering the State's good environmental performance? Thinking of an investment that its value derives from its contribution to the protection of the environment and climate targets, such as a recycling project to handle industrial waste, an investment in renewable energy sources or an investment for energy saving, the question that arises is whether there could be environmental arguments in support of investors' claims brought before arbitration for violations of that kind of investments' protection; environmental arguments could be developed mainly in the context of investor's legitimate expectations based on State's obligations under international environmental treaties.

For instance, the *Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines* is a pending case before ICSID that concerns investor's rights under a dredging contract concluded with the Philippines Department of Environment and Natural Resources.[220] The dispute arose after the government's unilateral termination of the contract, entered into by the previous administration with a Belgian company, for the rehabilitation of the Laguna Lake. The rehabilitation project was designed to reduce the flooding caused by heavy siltation and to improve the ecological condition of the area. In this specific case, the Philipiness government supports that the project was 'a midnight deal' of the past administration, alleging that the cancellation was made on the grounds that was not a good deal for the State. However, we could think of similar ongoing environmental projects that are being terminated against the urgent protection of the host state population due to the State's bad governance and maladministration or a government's decision to benefit local competitors, despite their poorer expertise, at risk of the environment, for political purposes. Thus, assuming that the host state engaged in conduct as to the investment that was not transparent and as such not predictable, fostering corrupt practices or patronage, the investor could support its claim of denial of the FET standard protection with human rights principles. Indeed, a strong argument could be based on the breach of investor's legitimate expectations arising out of a combination of host State's commitments to promote environmental projects and host State's obligations to realize human rights through good governance and a corruption-free environment.[221]

[220] Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines (ICSID Case No. ARB/11/27), case details available online at: http://investmentpolicyhub.unctad.org/ISDS/Details/443

[221] See Karamanian, S. L. (2013), supra note 3, at p. 445.

Marles a long time before the investor's environmental claim in the Peter Allard v. Barbados case, commenting on the Nykomb case, observed that the Nykomb case served as an example of an environmentally friendly foreign investor that had to confront with the 'environment-unfriendly' strategies of the host state electricity monopoly.[222] Indeed, the Nykomb case concerned a Swedish investor and its construction of a highly efficient co-generation power plant in Latvia.[223] Marles brought up that one of the reasons that the host state was unwilling to pay the agreed high tariff for the energy provided by the foreign investor – this unwillingness being the subject of the dispute – was that it was receiving cheap energy form Russian power plants despite the fact that they were operating with almost no environmental controls. Yet again, we should assess every specific case in all its aspects, as there might be an issue with regard to others stakeholders' rights and conflicting interests, which calls for a balanced approach; for instance, in the Nykomb case, the right to access to affordable energy of the host state population.

In his article, Lavranos to support his argument of "double-edge sword", used as an example Indonesia's omission to take appropriate measures to prevent and repress illegal forest fires – fires that aim directly to create land for palm oil corps.[224] He argues that these fires may constitute a violation of the full protection and security standard of foreign investors protected under an IIA. Yet, he fails to mention that apart from the local companies, foreign companies run the palm oil production in Indonesia, meaning that the same fires serve the purposes of foreign investors. So the questions that arise are "should the host-state pay compensation to a foreign investor for damages resulted from another's foreign investor illegal actions or even negligent business operation?" and, similarly, "could a host state, that fails to prevent a marine pollution, result of a foreign oil company's operations in its area, violate the FET or/and FPS standards of another foreign investment, such as a tourist resort or a foreign investment in fisheries?".

The position of the present paper is that every case is fact-specific and should be considered separately. Most importantly, there shouldn't be space for pretextual invocation of environmental arguments by the investors. More specifically, investors should not be encouraged to invoke environmental arguments in support of their claims, when they have not

[222] Marlles, J.R. (2007). Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law. *Journal of Transnational Law and Policy, Vol. 16: 2*, 275-336, at pp. 320-322.

[223] Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC, Arbitral Award, 16 December 2003.

[224] Lavranos, N. article.

complied with their earlier obligation to exercise due diligence. An investor that decides to start an investment in a developing country or a country in transition cannot expect the easiest investment climate and has to accept greater business risks than those in other countries. Indeed, "investors are expected to be intelligent and aware of the environment into which they are investing".[225]

The tribunal, in the case of *Mamidoil v. Albania* provided a strong argumentation in support of the above.[226] The tribunal, after noting that at the time of the investment the host state "was in a dilapidated situation, with its infrastructure run down and with its legal framework, regulation and independent justice absent and with no stability", held that "these circumstances matter". It further stated that "[a]n investor may have been entitled to rely on Albania's efforts to live up to its obligations under international treaties, but that investor was not entitled to believe that these efforts would generate the same results of stability as in Great Britain, USA or Japan".[227] In other words, the FET standard cannot be interpreted as to impose unrealistic obligations to the host States and "the obligation of the State does not dispense the obligation of the investor to evaluate the circumstances. Reliance has at its prerequisite diligent inquiry and information" and "the standard is addressed to both the State and the investor. Fairness and equitableness cannot be established adequately without an adequate and balanced appraisal of both parties' conduct".[228]

Similarly, an investor who has acted in bad faith, having chosen a host-state exactly due to its poor environmental law compliance and enforcement, or generally its 'easy to handle', 'not by the book' administration, with the aim to facilitate its investment and obtain the easy way the required, lets say, operating license or environmental permit, cannot then seek protection before the arbitral tribunals, using environmental arguments in support of its claims for treaty violation.

That is to say that, in any circumstances, the tribunal should take into consideration the investor's obligation to due diligence, in order to assess the reasonableness of its legitimate expectations, or even any possible illegal actions or omissions on investor's behalf

[225] See Olguin v. Paraguay, Award, 26 July 2001, para. 65b; Alex Genin and others v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001, 17 ICSID Rev.—FILJ 395 (2002), para. 348; Methanex v. United States of America, UNCITRAL Arbitration, Final Award on Jurisdiction and Merits, 3 August 2005, p. 5, paras. 9-10, as cited in Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, para 373, footnote143.

[226] Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015 [hereinafter Mamidoil v. Albania, Award]; See also UNCTAD (2016) IIA Issues Note No. 2: Investor-State Dispute Settlement: Review of Developments in 2015, at pp. 22-3.

[227] Mamidoil v. Albania, Award, paras 625-6.

[228] Id., para 634.

that deprive him of the IIA protection.[229] This position is in full conformity with the tribunal's approach in *Peter Allard v. Barbados* case, which was a strict one towards investor's earlier negligent behaviour regarding the environmental standards of its investment that was evaluated by the tribunal as facts that weakened investor's environmental arguments. Finally, as every case is fact-specific, arbitrators should take into consideration all stakeholders' rights and any possible conflict that could arise between investor's rights and the human rights of the host State population, either collective or private rights.

2.3. INVOCATION OF THE RIGHT TO A NATIONALITY TO ESTABLISH JURISDICTION *RATIONE PERSONAE*

Petersmann uses the word 'paradox' to describe the role of nationality in international investment law; the paradox of a specific nationality as a prerequisite for jurisdiction *ratione personae* of the Centre.[230] Indeed, there is a paradox, considering, as Schreuer brilliantly notices, that "a lot of ink is spilt and a lot of time is spent to prove a particular nationality. But when a case reaches the merits, strangely enough, distinctions on the basis of nationality are taboo".[231] Then, on the merits, discrimination on the basis of nationality would value for arbitrary and discriminatory treatment, for violation of the NT and MFN clauses or for a violation of the FET standard.[232]

This 'paradox' is alien to international human rights law that guarantees rights regardless of nationality; individuals enjoy their rights not by virtue of their nationality, but as

[229] For investors' obligation to exercise due diligence, see the tribunal's analysis in the case of Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015; For investors' misconduct, see the tribunal's analysis in the case of Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014; See also Newcombe, A. (2012) Investor Misconduct: Jurisdiction, admissibility or merits? Cambridge Books Online, Cambridge University Press, 187-200.

[230] Petersmann, E.-U. (2009), supra note 26, at p. 15. See also Dupuy P. (2009), supra note 8, at pp. 47-48.

[231] Schreuer notices *"a general paradox about this whole business of nationality"* in: Schreuer, C. (2009) Nationality of Investors: Legitimate Restrictions vs. Business Interests. *ICSID Review (2009) 24(2) – Foreign Investment Law Journal*, 521-527, at p. 527.

[232] Ibid.

human beings.[233] In addition, this 'paradox' in international investment law has been seen as an 'anachronism' in today's world of globalization, considering that nationality was the key to remedies in the field of diplomatic protection, the ancestor of modern treaty-based international investment protection law, where only the State could raise a claim for injuries suffered by individuals - and not individuals themselves - and this State's intervention on behalf of its national against another State drew its legitimacy from the link of nationality.[234] While the modern international investment protection system accords investors with benefits such as the opportunity of asserting their own rights under international law and the non requirement of previous exhaustion of local remedies, nationality remains a threshold criterion for investors' protection.[235]

Indeed, international investment policy deals with standards of protection and treatment of foreign investors in national investment policies and in IIAs that are premised on the ability to establish clearly and unequivocally, on the one hand, the 'foreignness' of an investment and, on the other hand, the specific nationality of the investor as a prerequisite for treaty benefits eligibility.[236]

The article 25 (1) of the ICSID Convention provides that only a legal dispute, arising directly out of an investment, between a Contracting State and a national of another Contracting State qualifies for jurisdiction of the Centre. Thus, the Claimant investor must possess the nationality of any Contracting State other than the Respondent host-state (both a positive and a negative nationality requirement), meaning subsequently that dual nationals – one of their nationalities being that of the host state – are precluded from the right to arbitration before the Centre. Indeed, in the case of individuals, the claimed nationality of the Contracting State must exist at two separate dates: at the time of the parties' consent to the Centre's jurisdiction and, in addition, on the date the request for arbitration or conciliation is registered by the Centre.[237] In parallel, the individual investor must not have the nationality of the host state on these two dates. The motive behind this exclusion is to bar disputes that are

[233] Petersmann, E-U. (2009), at p. 15, Schreuer, C. (2009), at p. 527, and Aghahosseini, M. (2007). *Claims of Dual Nationals and the Development of Customary International Law: Issues before the Iran-United States Claims Tribunal.* Leiden; Boston: Martinus Nijhoff Publishers, at p. 107.

[234] ILA German Branch/Working Group (2011). *The Determination of the Nationality of Investors under Investment Treaties –A Preliminary Report*. Heft 106 (March 2011), at p. 12.

[235] Ibid.

[236] UNCTAD, World Investment Report, Investor Nationality: Policy Challenges, at pp. 125-6.

[237] See Dozler and Schreuer (2012). *Principles of International Investment Law*. Oxford University Press. 2nd edition, at pp. 252-3.

normally settled locally.[238] This prohibition, in fact, applies to an investor with a dual nationality, even if the host state's nationality is not its effective one.[239]

The investor's nationality is determined by the domestic legislation of the State whose nationality is claimed.[240] However, as the Tribunal in *Siag v. Egypt* case argued citing Professor Schreur, the international tribunal is not bound by the national law of that State under all circumstances; there are situations where nationality provisions of national law may be disregarded.[241] Instances where national rules may not be followed include cases of ineffective nationality where there is no genuine link between the State and the individual-investor, cases of involuntary acquisition of nationality[242] or cases of withdrawal of nationality contrary to international law.[243] However, apart from the above mentioned 'admissible' instances, nationality issues can be arise when a Contracting State, party to arbitration, challenges as invalid a voluntary renouncement of a nationality or when individuals – we could think of economic immigrants - involuntary lose their nationality by birth due to their naturalization upon residence in another state. In all above cases, international human rights law and the right to a nationality can be used as an important weapon for the protection of investors as individuals claiming the protection of an IIA or BIT.

A. The Investor's Right to a Nationality in Pey Casado v. Chile

In the case of *Pey Casado v. Chile*, the first two aspects of the award concerned jurisdiction with regard to the nationality of Pey Casado. More specifically, Pey Casado, for a considerable period of time, had a dual nationality of Spain and Chile.[244] The Tribunal, in its

[238] UNCTAD (2003) *Dispute Settlement: International Centre for Settlement of Investment Disputes- 2.4. Requirements Ratione Personae*. United Nations Publications, at p. 14.

[239] Ibid.

[240] Id, at p. 13.

[241] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (Siag v. Egypt case), ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, at para 145.

[242] Dr Amerasinghe, discussing the possible limitations arising in the course of nationality determination by tribunals, writes that: "The possibility of ignoring a nationality involuntarily acquired was mentioned at the consultative meetings, by governments, and in the Legal Committee. Thus it could well happen that a person who has involuntarily acquired the nationality of the host State will be regarded as not having the nationality of that State for the purposes of Article 25 (2); or that a person who has involuntarily acquired the nationality of another Contracting State would not be regarded as having the nationality of that Contracting State for the purposes of the same article."

[243] Siag v. Egypt, Decision on Jurisdiction, at para 145.

[244] Pey Casado was a Spanish national from his birth in 1915. In 1939, he moved to Chile and lived there for 34 years until 1973. He acquired Chilean nationality by naturalization in 1958, retaining though his Spanish nationality, being a dual national, under the Chile-Spain Bilateral Convention on Dual Nationality. In 1973, following the coup d'etat, he left Chile and took residence in Spain. In 1996, Pey Casado notified the Chilean Department of Foreign Affairs and Migration that he had resided in Spain since 1974 and had no intention to

award of 2008, found that it had jurisdiction ratione personae, with regard to part of the claims, since the Claimant had voluntarily and validly renounced his Chilean nationality prior to the critical - according to Article 25 (2) (a) of the ICSID Convention – relevant dates.[245]

The particular significance of that award, with regard to the nationality issue examined, consists in the fact that the Tribunal referred explicitly to international human rights law, as part of its argumentation in favor of its jurisdiction. The tribunal recalled the provisions regarding the right to a nationality and the following right to a renouncement of a nationality contained in the American Convention on Human Rights (ACHR).[246] Specifically, the Tribunal stated that although these rules are not directly applicable to the present case, taking into account that the ACHR was ratified by Chile in 1990 and it is not directly applicable to Spanish nationals, it should nevertheless be emphasized that Article 20 of ACHR precludes a State from prohibiting the renouncement of nationality by establishing that "no one shall be arbitrarily deprived of his nationality nor the right to change it".[247] The Tribunal argued, subsequently, invoking the directly applicable host-state law, that, indeed, the Chilean legislator's reason behind the inclusion of the right to change nationality in the Chilean Constitution, was the necessary harmonization with the American Convention on

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avail himself of the Convention on Dual Nationality, considering that Chile deprived him of the benefits of the said Convention on September, 1973. He stated that his exclusive nationality would be the Spanish one. This statement along with a proof of Spanish residence and an explanatory declaration addressed to the Ministry of Interior of Chile were considered by the tribunal as a valid voluntary renouncement of the Chilean nationality of Mr Pey Casado. See Pey Casado v. Chile Award, 2016 (in English), at para 2, regarding the facts of the case, and Pey Casado v. Chile Award 2008 (in Spanish), at para 287-290, regarding the renouncement of the Chilean nationality.

[245] "Mr Pey Casado and the Foundation Presidente Allende submitted a Request for Arbitration to ICSID on 7 November 1997, in reliance on the Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Protection and Promotion of Investments ("BIT") which had entered into force on 29 March 1994…" (Pey Casado v. Chile, Award, 2016, at para 15).

[246] Pey Cadado v. Chile, Award 2008, at para 313.

[247] Likewise, article 15 (1) and (2) of the Universal Declaration on Human Rights (UDHR) provides that *"Everyone has the right to a nationality" and "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"*. The right to a nationality is a fundamental human right, implying the right of each individual to acquire, change and retain a nationality. The right to a nationality is recognized in a series of international legal instruments, including the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Nationality of Married Women, the Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons and the Convention relating to the Status of Refugees.

"International human rights law provides that the right of States to decide who their nationals are is not absolute and, in particular, States must comply with their human rights obligations concerning the granting and loss of nationality" (See regarding the Right to a Nationality and Statelessness, at the website of the OHCHR, at: http://www.ohchr.org/EN/Issues/Pages/Nationality.aspx).

Human Rights and other international conventions that allows for the voluntary renouncement of a nationality.[248]

Moreover, the Tribunal referred to the *Soufraki v. the United Arab Emirates* ICSID case, to support that even if the applicable law with regard to the nationality of a particular State is in principle the law of that State, the international judge or arbitrator is entitled to assess its content and its effects.[249] Indeed, article 41 of the ICSID Convention provides that the tribunal shall be the judge of its own competence. In general, the tribunal cannot exclusively decide a dispute on nationality questions in accordance with the applicable law - national law of the host-state – but, instead, it is entitled to carry out its own analysis either, for example, on the existence or not of a genuine link between the individual Claimant and the State or the illegal or not acquisition of claimed nationality.[250] Thus, the tribunal does not exceed it powers when examining nationality issues.

Exactly, the Tribunal in the *Soufraki v. UAE* case provided a more in depth and interesting analysis with regard to its own competence on nationality determinations. In that case, the Claimant, in his testimony before the Tribunal, asserted that he considers himself an Italian as of right and choice and he never intended to renounce his Italian nationality.[251] Arguing in response to the Claimant's Request for annulment and standpoint that "no international tribunal has the power to grant or withdraw nationality", the tribunal distinguished between 'constitutive acts' and 'declaratory acts' and the relevant different roles of sovereign States' officials and international arbitrators.[252]

Namely, the Tribunal supported that "there is a notable difference between the granting of nationality on the national level – which is a constitutive act – and the recognition of nationality on the international level, – which is a declaratory act"; thus, the question posed before the Tribunal was not to grant or withdraw the Claimant's Italian nationality - a determination of nationality for domestic law purposes reserved entirely for sovereign states, but rather to recognize or not that nationality- a nationality determination with international effect and for international arbitration-jurisdictional purposes, which can be subjected to

[248] Pey Casado v. Chile, Award 2008, at paras 313-315.
[249] Id, at para 319.
[250] Nerets, V. (2011). Nationality of Investors in ICSID arbitration. *Riga Graduate School of Law - RGSL Research Papers No.2,* 1-53, p. 19.

[251] Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award, 7 July 2004, at para 51.
[252] Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, at para 55.

review in certain circumstances.[253] The core idea was that "the efficacy on the international level of the declaratory act is contingent upon the conformity of the grant of nationality both with the national law of the State of nationality and international law requirements such as effectiveness".[254] Yet, as it will be argued below, this significant argumentation in that specific case led to an unfair outcome that could be avoided if the Claimant hold on to his purely supported argument on his Italian nationality as of right and choice backing it up with invocation of international human rights law.

Indeed, the same argumentation, by direct reference to *Soufraki v. UAE* case, backed up with references to international human rights law by the tribunal itself, led to a positive outcome for Pey Casado. The Committee that decided upon Chile's Application for Annulment, after reviewing the part of the Award with regard to the Tribunal's jurisdiction which considered Pey Casado's renouncement of his Chilean nationality valid, found that the Tribunal did not exceeded its powers, but rather applied and interpreted the proper Chilean law of nationality, by articulating sufficient and convincing reasons and referring to the Chilean Constitution and international conventions[255] in order to reach its conclusion.[256] Moreover, the Committee supported that "its remit is not to examine whether or not the Tribunal's interpretation complies with Chilean law but whether the Tribunal's interpretation is manifestly contrary to the principles of Chilean law."[257] [258]

In *Pey Casado v. Chile* case, the facts were clear and no one could argue for indications of fraud or malfeasance by the Claimant. Neither could we recognize a case of 'national routing'. The reasons for Pey Casado's Chilean nationality renouncement were not "initiated" by the Claimant but a coup d'etat; under these circumstances it is even questionable if a voluntary or involuntary loss of nationality has taken place, considering the persecution of the investor by the military and the government of Pinochet. Moreover, it is essential, that in this specific case, the Respondent state had ratified the American Convention on Human Rights that recognizes the right to a nationality as a fundamental human right. Yet,

[253] Ibid.
[254] Ibid.
[255] The Tribunal made references to the Spain - Chile Dual Nationality Convention, the Rio de Janeiro Pan-American Convention of 1906 and the Inter-American Convention of Human rights.
[256] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012 (English), at para 102, and Schreuer, C. (2014) Case Comment: Victor Pey Casado and President Allende Foundation v. Republic of Chile – Barely an Annulment. *ICSID Review, Vol. 29, No. 2 (2014)*, pp. 321–327, at p. 323.
[257] Pey Casado v. Chile, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, at para 102.
[258] The Committee also found that the shifting of the burden of proof regarding the Claimant's nationality upon Chile was not a serious departure from Tribunal's procedural rules, since the Claimant had discharged his initial burden of proof that he had renounced his Chilean nationality (See Schreuer, 2014, at p. 323).

again the tribunal to strengthen its argument and avoid any objections or doubts regarding its jurisdiction, invoked the directly applicable host-state law, and specifically, the provisions of the Chilean Constitution, making an interpretation with regard to the object and purpose of the Chilean legislation in the light of its necessary harmonization with the ACHR and other international conventions.

B. Considerations on the Soufraki v. UAE case in light of the right to a nationality

Nevertheless, this was not the case in *Soufraki v. UAE* case, with regard to Claimant's alleged Italian nationality. Instead, in Soufraki case, the Tribunal found that had no jurisdiction after not recognizing Claimant's alleged Italian nationality (which would fulfill the positive requirement). Namely, although, both parties agreed that, prior to 1991, the Claimant was an Italian national, the Respondent supported that Mr. Soufraki lost automatically his Italian nationality, when he took up residence in Canada and acquired Canadian nationality. However, Mr. Soufraki asserted that he never intended to relinquish his Italian nationality and he argued that "in the absence of fraud, it is not the province of the Tribunal to challenge the position of Italian authorities affirming the Italian nationality of Mr. Soufraki".[259] Indeed, there was no such a fact indicating an intention for fraud on the behalf of the investor, and moreover, he had presented before the tribunal a certificate of nationality issued by the competent authorities of the Italian State, which is a strong evidence for the existence of the Italian nationality claimed, yet the tribunal made its own decision.[260] Moreover, a brief reference to *Nottebohm* case[261] was made by the Claimant, who argued that, contrary to the

[259] Soufraki v. UAE, Award, at para 37.

[260] Schreuer (2009), at p. 522.

[261] In the landamark *Liechtenstein v. Guatemala* ICJ case, Nottebohm was a German national by birth (in 1881), until his naturalization in Liechtenstein (in 1939), being though longtime resident in Guatemala (since 1905), which he made the center of his business activities. He lost his German nationality upon acquisition of the foreign one of Liechtenstein, according to German law on citizenship. However, he had no tenuous connection with Liechtenstein; he acquired that nationality through payment of a substantial sum to a principality's division, a commitment to pay taxes, and a visit of less than two weeks to complete the formalities of the naturalization process. In 1951, Liechtenstein filed an Application instituting proceedings in ICJ against Guatemala, claiming damages in respect of various measures which Guatemala had taken against Nottebohm and his property. Guatemala objected the admissibility of Liechtenstein claim on behalf of Nottebohm, arguing that his Liechtenstein naturalization was defective. The ICJ found that Nottebohm's Liechtenstein nationality had no international effect, at least for the purposes of exercising protection against Guatemala. The ICJ examined if the Nottebohm's acquisition of Liechtenstein nationality was 'real and effective' and concluded that it was not, thus it could not be used as a weapon against another state. The ICJ gave a definition of nationality, stating that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties". See more details on the Nottebohm case in: ICJ Summaries of Judgments and Orders, Liechtenstein v. Guatemala ICJ case (Nottebohm case), Second Phase, Judgment of 6 April 1955, and Spiro, P.J. (2011). A New International Law of Citizenship. *American Journal of International Law 694, 2011,* 1-94, at pp. 20-22.

landmark on nationality determination ICJ case facts, his Italian nationality was not a nationality of convenience in circumstances of speed and accommodation but, instead, a nationality of birth, yet, disappointingly, the tribunal did not consider it to be relevant.[262]

Mr. Soufraki could refer to international human rights law and his right to a nationality to strengthen his claim in establishing the tribunal's jurisdiction. The counterargument provided by the Respondent and the tribunal's argument was simply based on bureaucratic process reasoning, as it was admitted that Mr. Soufraki, after acquiring the Canadian nationality, could have reacquired automatically his Italian nationality after 1992 by a timely application.[263] Thinking of the right to a nationality as a fundamental human right, the loss of which should not be arbitrary, "the notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of appropriateness, injustice and lack of predictability also".[264] Mr Soufraki was an Italian national by birth; he claimed his Italian nationality by right of *jus soli* and *jus sanguinis*. Moreover, the Italian competent authorities themselves affirmed, even afterwards, the maintenance of the Claimant's Italian nationality. The tribunal's reasoning with regard to its own competence, presented above in *Pey Casado v. Chile* case, was the declaratory nature of tribunal's decision on determining the Claimant's nationality unlike the constitutive nature of states authorities act of nationality determination. Yet, we cannot overlook the fact that even a declaratory act in investor-state arbitration has legal effects for the person concerned, who ends up in deprivation of the protection accorded to him by reason of his nationality.

At this point, considering the tribunal's determination with regard to Claimant's Italian nationality, it is essential to stress that the European Convention on Human Rights does not recognize independently a right to a nationality.[265] Instead, according to the

[262] Soufraki v. UAE, Award, at para 45.

[263] Id., at para 27.

[264] De Groot, R. (2013). Survey on Rules on Loss of Nationality in International Treaties and Case Law. *CEPS Paper in Liberty and Security in Europe, No. 57/ August 2013.* 1-27, p. 21.

[265] The right to citizenship in European human rights law is thoroughly discussed by Judge Pinto de Albuquerque, at paragraph 7 of his Dissenting Opinion, in Ramadan v. Malta case: "The right to a citizenship was neither included in the Convention nor in any of the Protocols thereto. The committee which drafted Protocol No. 4 to the ECHR contemplated inserting a provision to the effect that "a State would be forbidden to deprive a national of his nationality for the purpose of expelling him". Although the principle which inspired the proposal was approved by the committee, the majority of experts thought it inadvisable to tackle the delicate question of the legitimacy of measures depriving individuals of nationality. It was also noted that it would be very difficult to prove whether or not the deprivation of nationality had been ordered with the intention of expelling the person concerned. In 1988 the Council of Europe's Committee of Experts for the Development of Human Rights started examining the question of the right to a nationality as a human right and considering the possibility of inserting such right into the ECHR through an additional protocol to the Convention. However, States were not ready to adopt an additional protocol on the right to a nationality. In 1992 an expert committee on nationality initiated a feasibility study for a new, comprehensive convention on nationality. As a result, the

explanatory report to ECHR, the ECHR and its Protocols do not contain direct provisions with regard to the right to a nationality, yet certain provisions may apply also to matters related to the right to a nationality, due to that right's violation interference with other rights recognized in ECHR, such as the right to a private and family life (article 8 of the ECHR), the prohibitions on the expulsion of nationals (article 3 of Protocol No. 4 of the ECHR) and the prohibition of the collective expulsion of foreigners (article 4 of the same Protocol).

This ECHR deficit was manifested explicitly in the Dissenting Opinion of Judge Pinto de Albuquerque, in the recent ECtHR *Ramadan v. Malta* case, who argued in favor of recognition of the existence of an autonomous Convention right to citizenship.[266] He further supported that "while it is a clear tenet of international law that each State has the sovereign responsibility to determine under national law who are its citizens, that role is subject to international principles", referring also to International Law Commission (ILC) Draft Articles on Nationality of Natural Persons in relation to the Succession of States, that indicated that international law set limits to the competence of States with regard to the nationality determination.[267]

At this point, it is worth to make reference to the *Siag v. Egypt* case. It is another case brought before ICSID, where Claimants' nationality and tribunal's jurisdiction were challenged by the Respondent, yet the tribunal found that it had jurisdiction, applying exclusively the domestic Egyptian law and arguing that in that specific case there was no scope for principles of international law to prevail over the operation of national law as to nationality determination.

Specifically, in that case, the Claimants brought a claim against Egypt, as Italian nationals, arguing that they lost their Egyptian (host-state) nationality through application of Egyptian national law. The tribunal found that the facts argued for Claimants' acquisition of Italian nationality for recognized reasons[268] occurred long time before their claims were

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European Convention on Nationality was adopted in 1997." Case of Ramadan v. Malta. ECtHR - Application No. 76136/12, Judgment, 21 June 2016, Final 17/10/2016, Dissenting Opinion of Judge Pinto de Albuquerque, at pp. 25-43.

[266] Ramadan v. Malta. ECtHR Judgment, 2016, Dissenting Opinion of Judge Pinto de Albuquerque, at pp. 25-43.

[267] Id, at pp. 31-32.

[268] Mr Siag, born in Egypt in 1962, acquired voluntarily Lebanese nationality in 1990 and, finally, Italian nationality by marriage to an Italian in 1993, while the confiscation of his property by the Egyptian government took place in 1996. Ms Vecchi, the mother of Mr Siag, born by Italian parents and, thus, an Italian national by birth, acquired the Egyptian nationality and lost her Italian nationality in 1957 by marriage to Mr Siag's father who was an Egyptian citizen, and, then, she lost it upon her husband's death, reacquiring her Italian nationality (See Siag v. Egypt, Decision on Jurisdiction, at para 154, for Mr Siag background and para 174-175, for Ms Vecchi background).

175. Ms Vecchi's marriage came to an end in 1987 upon the death of her husband, Mr Elie George Siag.

brought before ICSID and not as a mere expedient, thus the Claimants possessed genuine links to Italy.[269] Finally, the tribunal found that in that specific case there was no scope for principles of international law to prevail over the operation of national law as to nationality determination; "to do so would in effect involve the illegitimate revision of the terms of the BIT and the Nationality Law by the Tribunal".[270]

Briefly, in the *Siag v. Egypt* case, Mr Siag was an Egyptian national (host-state national) by birth, still he had, initially, voluntarily changed his nationality to Lebanese and afterwards acquired Italian nationality through marriage to an Italian, claiming that final Italian nationality for his BIT protection against Egypt. It was considered that the acquisition of Italian nationality – and his key to arbitration - was not a mere expedient but, instead, consistent with the domestic Egyptian law upon loss of nationality. The tribunal, thus, found that the acquisition of a nationality by marriage – a mere life coincidence - can accord him the BIT's protection, without recurring to principles of international law, because there was no need to do that.

Instead, Soufraki was an Italian national by birth who lost his Italian nationality basically against his will, automatically due to an acquisition of a foreign nationality upon residence in Canada, Italian authorities affirmed his Italian nationality afterwards, yet still the tribunal's conclusion was that he could not benefit from the BIT's protection. This is a quite a paradox, that could be prevented by the Claimant's invocation of the right to a nationality in investor-state arbitration. That invocation could be essential, either in cases where the Claimant has a right to retain a nationality (and, thus, meet the positive requirement), or in cases where the Claimant has a right to change a nationality (and meet the negative requirement).

Finally, the question arising is if international human rights law could override the operation of national law as to nationality determination in favor of the Claimant. Would the application of international human rights law involve the illegitimate revision of the terms of the BIT and the nationality law by the tribunal?

C. The Inconsistency between the Nationality Requirements used for Individuals and those used for Corporate Entities

A second reason for which the invocation of a right to a nationality is considered essential for the protection of investors as individuals, is the severeness expressed by the tribunals and by the investor-state arbitration system in general, in the case of individuals; clearly there is a

[269] Siag v. Egypt, Decision on Jurisdiction, at para 200.
[270] Id, at para 201.

different approach when it comes to corporate nationality considerations.[271] This different treatment between individuals investors' nationality and corporations' nationality is pointed out in the aforementioned *Soufraki v. UAE* case, where the tribunal commented plainly that the Claimant could have avoided the unfavorable result of the rejected jurisdiction, if he had incorporated a corporate vehicle in Italy instead of contracting in his personal capacity.[272]

It is notable that the tribunal, in *Soufraki* case, suggests a solution admitting easily at the same time that this solution is only acceptable in the case of legal entities, whereas the same would not have been acceptable in the case of an individual investor finding a suitable nationality. This acknowledgment emphasizes the inconsistency between the requirements used for the determination of jurisdiction in the case of investors as individuals and those used for investors as legal persons.[273] Schlemmer remarks that the tribunal in that case makes a clear suggestion that *"an investor should go 'nationality hunting' or 'treaty shopping' by way of establishing a corporate presence in a jurisdiction that has a BIT with the host country, based on the best possible protection that such a BIT can offer"* and argues that such an angle may encourage non-nationals of any Contracting State to play upon the ICSID Convention, by setting up a legal entity in a jurisdiction that offers a BIT with the host State and provides for ICSID dispute settlement.[274]

This inconsistency can be detected taking into consideration the aforementioned cases in comparison to *Tokios Tokeles* case. Contrariwise to the unfavorable result for Mr. Soufraki - an individual, the result in *Tokios Tokeles v. Ukraine* case was favorable for the Claimant, a legal entity incorporated in Lithuania but controlled by Ukrainian nationals- nationals of the host state. Although the Respondent objected to jurisdiction on the basis that the Claimant was not a genuine investor of Lithuania as controlled by Ukrainian nationals, for the Tribunal's majority, incorporation in Lithuania in accordance with local rules and regulations met the BIT's definition of nationality (BIT between Lithuania and Ukraine) and was, hence,

[271] Nerets, V. (2011). Nationality of Investors in ICSID arbitration. *Riga Graduate School of Law - RGSL Research Papers No.2,* 1-53, p. 23.

[272] Soufraki v. UAE, Award, at para 83. See also Schreuer, C. (2009) Nationality of Investors: Legitimate Restrictions vs. Business Interests, at p. 524.

[273] Schlemmer, E. (2008). Investment, Investor, Nationality, and Shareholders. In: Muchlinski, P., Ortino, F., Schreuer, C., & Schlemmer, E. (eds) *The Oxford Handbook of International Investment Law, 2008*. Oxford University Press, at p. 74.

[274] Ibid.

considered sufficient.[275] The Tribunal argued that "the object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of "investors" in Article 1(2)(b)".[276]

Ukraine also argued that the Claimant did not maintain 'substantial business activity' in Lithuania, and for that reason jurisdiction should be denied.[277] The tribunal again was very clear stating that, while the Claimant has provided significant information regarding its activities in Lithuania and these activities would appear to constitute 'substantial business activity', the tribunal need not affirmatively decide that they do, as it is not relevant to its determination of jurisdiction.[278] The tribunal, moreover, affirmed that its decision was based on an interpretation according to the ordinary meaning and context of the terms of the Ukraine-Lithuania BIT, and in the light of the object and purpose of the Treaty, according to which the only relevant consideration is whether the Claimant is established under the laws of Lithuania, neither whether has a genuine link with Lithuania nor whether has substantial business activity in Lithuania.[279]

Thus, while a nationality conferred to an individual without regard to any effective link between the State conferring the nationality and the individual or, generally, a 'nationality of convenience', obtained by the mere compliance with certain procedural steps, may be challenged by host states, at the same time, structuring investments through the establishment of legal entities in different jurisdictions or 'national routing' does not constitute a wrongdoing neither a basis for a doctrine of veil piercing.

This inconsistence and inequality, however, arising out from "the more strict treatment that the ICSID Convention gives to the nationality of individuals, as compared to the flexibility evidenced in respect of corporate nationality" according to Professor Francisco Orrego Vicuna, is well justified.[280] Namely, in his Partial Dissenting Opinion in *Siag v. Egypt* decision on jurisdiction, he supported that "nationality of individuals entails a link of allegiance with the nation and the State, while corporate nationality is more a question of convenience…" and that the reasoning behind the negative prerequisite (not to be a national of the host-state) is the concern expressed by many states "that did not want to be taken to

[275] Schreuer (2009), at p. 525 and Hoffmann, A.K. (2007) The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty. *ICSID Review - Foreign Investment Law Journal (2007) 22 (1)*, 69-94, at p. 84.
[276] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, at para 31.
[277] Id, at para 33.
[278] Id, at para 37.
[279] Id, at para 38.
[280] Partial Dissenting Opinion of Professor Francisco Orrego Vicuna, in Siag v. Egypt case, Decision on Jurisdiction, at pp. 62-63.

international arbitration by investors who were their nationals, even if holding a dual nationality- the nationality of another Contracting Party as well." The Report of the Executive Directors accompanying the ICSID Convention, that the Professor referred to in support of his dissenting opinion, states that "[t]his ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent"[281].

However, at the same time, the Professor stresses that in the absence of a definition of nationality in the ICSID Convention, the relevant principles of international law come into play instantly; referring to the principle of effectiveness.[282] Moreover, in the absence of any coherent rules on nationality in a given legal system, international tribunals have determined that individuals had the nationality of a State on the basis of principles of international law, "even though it may not have been entirely clear whether the law of that State regarded them as nationals, and sometimes even where they were not regarded as citizens for domestic purposes".[283] In this context, admitting the role of relevant principles of international law, the invocation of the right to a nationality, as relevant international law and as a tool for interpretation, by the Claimant can be a useful weapon against the inconsistency of the international investment arbitration system at the expense of individuals-investors' rights.[284]

D. Concluding Remarks

Considering the above discussed cases, we can identify the rules that are dominant regarding the determination of nationality in investor-state arbitration, and specifically in ICSID arbitration. We saw the positive and negative requirements for the Claimant and the national law of the State of the claimed nationality as governors, but also the principles of international law coming into play through tribunal's own competence to take them into consideration as considerable enough to rule over a nationality determination. Yet, international human rights law and the right to a nationality, with its subsequent right to change a nationality and the prohibition of arbitrary loss of a nationality, has been invoked as such only in Pey Casado v. Chile case, and, in fact, by the tribunal.

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[281] Ibid.

[282] Ibid.

[283] See the 'Definition of nationality' in Amerasinghe, C.F. (1975). Jurisdiction Rationae Personae Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. *British Yearbook of International Law (1975) 47 (1):* 227-267.

[284] See the analysis of Hernandez Uriz, G. (2005). *Human Rights as the Business of Business: The Application of Human Rights Standards to the Oil Industry*. European University Institute, at p. 104, on the view that "any reference to the general principles of law should be understood as including human rights principles".

In conclusion, States enjoy a degree of discretion with regard to the criteria governing acquisition and loss of citizenship-nationality, but these criteria must not be arbitrary.[285] In other words, the right of States is not absolute; States must comply with their human rights obligations regarding the granting and loss of a nationality. It is essential that, while, until recently, nationality indicated the attachment of a person to a nation, today, nationality might be seen rather as a fact of coincidence or convenience, and that should not be in expense of individuals' rights.[286] In parallel, the arbitral tribunal has its own competence to nationality determination, even as a declaratory act. Yet also the arbitral tribunal as cannot illegitimately revise the BIT rules and directly applicable domestic nationality law, it cannot bypass the international human rights law and should recur to invocation of the human right to a nationality, just as the tribunal did in *Pey Casado v. Chile* case, and the prohibition of arbitrary deprivation of nationality in order to determine nationality and jurisdiction issues.

Finally, in order to adjust the issue of inconsistence between individuals' and corporations' treatment, and possible injustice, by the investor-state arbitration system, on the one hand, the Claimants and the tribunals should invoke more often the human right to a nationality, especially in cases of involuntary acquisition or involuntary, illegal, arbitrary loss of nationality, and on the other hand, BITs should entail denial of benefit clauses[287] for corporations with no substantial business activity. The tribunal should use its own competence, in favor of an interpretation based on international human rights law and application of principles of international law in favor of Claimant's protection in cases of involuntary acquisition or involuntary, illegal or arbitrary loss of nationality, and, at the same time, against Claimant's protection in cases of fraud, misuse or any pretextual nationality change.

[285] Citizenship can be acquired automatically by operation of law, at birth or at a later stage, or as a result of an act of the administrative authorities, while cases in which a national of a State may lose his or her nationality may be a voluntary acquisition of another nationality, residing in another country on a permanent basis, fraud in the naturalization process, serving in a foreign military or foreign government, voluntary renunciation, and others depending on the relevant to the case applicable nationality laws (De Groot, 2013, at p. 13).

[286] ILA German Branch – The Working Group (2011), at p. 12.

[287] See for example, article 17 (1) of ECT and article 1113 of NAFTA.

4. HUMAN RIGHTS ARGUMENTS: A SHIELD FOR THE HOST STATE

In the previous Chapters, we observed the interplay between human rights norms and international investment law in defining the scope of investors' protection. How does that interplay work when defining the scope of a host State's obligations towards its own citizens? International human rights law imposes obligations on the host State, "which include not only the prohibition of engaging in human rights violations, but also the duty to prevent the infringement of human rights by others".[288] As stated by the Special Representative on human rights and transnational corporations and other businesses, John Ruggie, "the State duty to protect against non State abuses is part of the very foundation of the international human rights regime. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations".[289] This further means that a failure by the host state to protect its host State population may engage its responsibility.[290] It is in this capacity that the host States have invoked human rights in investor State arbitration.

States' obligations to protect human rights can derive, *inter alia*, from the host State domestic law (the Constitution and labour, environmental, property, mining, investment laws, etc), within which international human rights norms can be incorporated, from international human rights treaties or international customary law, environmental treaties and general principles of international environmental law (including principles of sustainable development). Moreover, sometimes international conventions that do not protect directly human rights, such as the UNESCO World Heritage Convention and the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), impose obligations on the host States that relate to their human rights obligations, such as the protection of cultural rights and the right to health, respectively; the host States have invoked these international conventions to justify the governmental measures challenged by the investor

[288] Reiner, C. and Schreuer, C. (2009), supra note 3, at p. 89.

[289] UN Human Rights Council. Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/4/35 19 February 2007, available at: http://www.dgvn.de/fileadmin/user_upload/DOKUMENTE/UN_Diverse/Ruggie_business_humanrights19Feb07.pdf, at para 18; See also the UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Human Rights Office of the High Commisioner, New York and Geneva, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[290] Ibid.

successfully.[291] Yet, as we will see below, invocation of international human rights law by the host States has been met with little enthusiasm; the host States have invoked their international human rights obligations particularly in cases involving public utilities, while, in general, they have relied on domestic law. In general, the host States have been mainly reluctant to invoke international human rights law in investor-state arbitration or they have failed to develop sufficient human rights argumentation. Instead, the arbitral tribunals have been willing to take into consideration human rights issues as argued by the amicus curiae submissions.[292]

In particular, Argentina has invoked its human rights obligations under its Constitution and the InterAmerican Convention on Human Rights (IACHR), in several cases, in support of its necessity defense, given the social and economic conditions during the crisis. Namely, in the case of *CMS Gas v. Argentina*, Argentina argued that "as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights".[293] In the case of Sempra v. Argentina, Argentina supported again that "the constitutional reform of 1994 recognized a number of international instruments on human rights to have constitutional rank" and further claimed that "the human rights so incorporated in the Constitution would be disregarded by recognizing the property rights asserted by the Claimant given the social and economic conditions of Argentina".[294] Furthermore, Argentina, in the *Sempra v. Argentina case*, invoked its human rights obligations under the IACHR, posing the following question to a legal expert, during the hearing: "[W]ould Argentina have been compelled because of the Inter-American Convention to maintain its constitutional order towards the end of 2001, 2002, and afterwards?"; the legal expert answered in the affirmative.[295]

[291] For cases where the host State invoked the UNESCO World Heritage Convention, see Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, 20 May 1992; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007; For cases where the host State invoked the WHO Framework Convention on Tobacco Control, see Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award, 8 July 2016.

[292] Id., at p. 90.

[293] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005 [hereinafter CMS Gas v. Argentina, award], at para 114.

[294] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 17 January 2007, at para 75.

[295] Sempra Energy International v. The Argentine Republic, Award, 28 September 2007 [hereinafter Sempra v. Argentina, award], at para 331.

The above cases may be indicative of host State's invocation of IHRL, but they are still cases where the host State invoked its international human rights obligation in a general way to justify, under a plea of necessity, its weakness to protect investors' rights according to the standards provided by the investment treaty.[296] Instead, in the water privatization cases, following their course within almost a decade, someone can observe the development of host States' human rights defense cases, based specifically on the right to water, where the center of attention is placed on host States' obligation to protect this basic human right and the challenged governmental measures relate to the protection of that specific right. Moreover, the significance of the water privatization cases lies on the fact that the host States have invoked the right to water, although there is no such a comprehensive right to water in human rights conventions. For this reason, I will focus on the water privatization cases at Chapter 4.1.1..

Then, the recent landmark case of *Philip Morris v. Uruguay*, is indicative of a host State defense based on the invocation of an international treaty (legally binding)– the WHO FCTC – which, although its policy objective is tobacco control, reaffirms the human right of all people to the highest standard of health.[297] For that reason, at Chapter 4.1.2., I present the *Philip Morris v. Uruguay* award, focusing on the host State's defense case and the tribunal's analysis.

Furthermore, Chapter 4.2. focuses on cases with human rights issues brought before investment arbitral tribunals, where the host State defense relied exclusively on its domestic human rights and environmental provisions, and international human rights law argumentation was provided only by the amicus curiae submissions. Specifically, Chapter 4.2. examines four case studies related to investment disputes in the mining sector. Mining cases concern extractive industries' investments that may affect the principal human rights of the host State population, including, *inter alia*, the right to live in a healthy environment, the right to water and sanitation, the right to property and territory (individual or collective rights), the right to food and also cultural rights. In this respect, apart from the substantive human rights, the participatory- procedural rights of the host State population must also be safeguarded by the host State. For all above reasons, this paper considers the mining case studies to be

[296] In fact, in the case of *CMS Gas v. Argentina*, the host State terminated the company's right to calculate tariffs in US dollars and its right to make inflation adjustments, while in the case of *Sempra v. Argentina*, the challenged governmental measures concerned the reduction in the profitability of the gas distribution business and the government's decision to stop reimbursing the subsidies. CMS Gas v. Argentina, Award and Sempra v. Argentina award.

[297] World Health Organization Framework Convention on Tobacco Control (WHO FCTC), available at: http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1, at p. v.

indicative of investment cases with significant human rights issues and concerns and focuses on the host State defense strategies and the tribunal's analysis and considerations. Last but not least, the majority of the case studies presented concern recently issued awards and interim decisions (between 2014 and 2016).

The present thesis acknowledges that there are a number of cases where human rights issues have been raised by the host State but, for all above reasons, concentrates on the aforementioned cases.

4.1. INVOCATION OF INTERNATIONAL HUMAN RIGHTS LAW BY THE HOST STATE AND THE AMICI

4.1.1. The Host State Defense in the Water Privatization Cases

According to the General Comment No. 15 of the UN Committee on Economic, Social and Cultural Rights (CESCR) - the body responsible for the oversight of the International Covenant on Economic, Social and Cultural Rights (ICESCR), "[w]ater is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights".[298] In particular, the right to water is contained in the right to adequate standard of living (Article 11 (1) of ICESCR), since it is one of the most fundamental conditions for survival.[299] Furthermore, it is inextricably related to the right to the highest attainable standard of health (Article 12 (1) of ICESCR) and the rights to adequate housing and adequate food (Article 11 (1) of ICESCR).[300] The right should also be seen in conjunction with the right to life (Article 6(1) of the ICCPR) and human dignity.[301]

The General Comment of the UN Committee was a major achievement towards the recognition of the right, yet it is "an authoritative interpretation of the ICESCR", meaning not legally binding.[302] In other words, the General Comment does not create a comprehensive human right to water, but it merely expresses the CESCR's view that the right to water is a

[298] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, available at: http://www.refworld.org/docid/4538838d11.html

[299] Ibid.

[300] Ibid.

[301] Ibid.

[302] Thielborger, P. (2009). The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict? In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 487-510, at pp. 490-2.

necessary part of other accepted human rights. Then, the UN General Assembly recognized, in its Resolution of July 2010, "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights", while the UN Human Rights Council adopted a similar resolution in October 2011, stating that "the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and [is] inextricably related to […] the right to life and human dignity" and calling on States to ensure enough financing for sustainable delivery of water and sanitation services.[303]

Farrugia (2015) notices that, over the last decade, cases, where international investment tribunals have had to deal with the right to water as States' defense against alleged breaches of an IIA, particularly cases concerning the privatization of water and sanitation services, started to come into public attention and, most importantly, gave rise to the development of an important jurisprudence with regard to State's obligation to protect the access to water for its local population and this obligation's dominance in international investment regime against investments' protection.[304]

Indeed, as Thielborger earlier had noticed, arbitrators, in the beginning, had mostly been reluctant to accept subjective rights when dealing with the protection and distribution of water, and only 'recently' (meaning the last decade) started to develop "creative and innovative approaches in recognizing a right to water – by linking the right to water to a variety of other accepted human rights".[305] The recognition of a human right to water has become, then, an "emerging trend" in international tribunals.[306]

*A. **Azurix v. Argentina:** compatibility of investment treaty provisions with human rights treaties*

The case of *Azurix v. Argentina* concerned a foreign investment in the water and sewage system of the Argentina Province of Buenos Aires and the conflicts that arose regarding the

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[303] UN General Assembly Resolution A/RES/64/292. *The human right to water and sanitation* (28 July 2010), available at: http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E and UN Human Rights Council Resolution A/HRC/RES/18/1. *The human right to safe drinking water and sanitation* (October 2011), available at: http://www.un.org/es/comun/docs/?symbol=A/HRC/RES/18/1&lang=E

[304] Farrugia, B. (2015). The human right to water: Defences to investment treaty violations. *Arbitration International, 31*(2), 261-282, at p. 262.

[305] Thielborger, P. (2009), at p. 489.

[306] Scanlon, J., Cassar, A. and Nemes, N. (2004). 'Water as a Human Right?' in World Conservation Union Environmental Policy and Law Paper, No 51 (2004) 13 ff, as cited in Thielborger (2009), at p. 489.

water quality and pressure, which finally led to the termination of the concession contract.[307] The US company claimed that the host State violated its obligations under the USA-Argentina BIT (of 1991), international law and domestic law. One of the arguments of the host State's defense related to the compatibility of the investment treaty provisions with human rights treaties. Namely, the Respondent argued that the governmental measures that led to the termination of the investment agreement aimed at the protection of consumers' rights and, thus, were justified, and that "a conflict between a BIT and human rights treaties must be resolved in favour of human rights because the consumers' public interest must prevail over the private interest of service provider".[308] However, the tribunal supported that the matter had not been fully argued by Argentina and noted that it failed "to understand the incompatibility in the specifics of the instant case", as "the services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service.".[309]

B. *Biwater v. Tanzania:* *the host State's margin of appreciation and ECtHR jurisprudence*

The case of *Biwater v. Tanzania* was related to the privatization of water and sewerage services in Tanzania. While the host State had privatized its water system in 2003, by transferring its control to the Biwater subsidiary City Water Systems (CWS), it took control back in 2005 by seizing investor's assets and occupying CWS's facilities, when it found that the management of CWS had deteriorated the water system and created problems with the supply of water. The Respondent, in its defense, invoked a Republic's margin of appreciation under international law in deciding how best to address a crisis, citing relevant ECtHR jurisprudence, and arguing that "City Water had created a real threat to public health and welfare". Namely, the Respondent supported that "[w]ater and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so.".[310] Thereon, the Respondent did not

[307] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006 [hereinafter Azurix v. Argentina, Award].

[308] Azurix v. Argentina, Award, at para 254.

[309] Id., at para 261.

[310] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, at paras 434-436; See also Krommendijk, J. and Morijn, J. (2009). Balancing investor interests and human rights by way of applying the proportionality principle in investor-state arbitration. In: Dupuy, P.M., Francioni, F. and Petersmann, E-U. (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 422-452, at pp. 440-1.

provide any further human rights based argumentation, yet extensive human rights arguments in support of host State's defense were provided by the *amici*.[311]

Indeed, the *amici* made a very strong argument that included all aspects that could support a human rights-based defense, from investor's responsibility and obligation to due diligence and good faith to State's obligation to protect the right to water. In regard of investors' legitimate expectations, amici stressed that "investors cannot expect the 'easiest' investment climate when investing in developing countries or countries in transition", but, instead, they may even have to accept greater business risks than those in another investment climate and that investment treaties are not insurance policies against bad business judgments.[312] Moreover, *amici* emphasized that the nature and extent of investor's responsibility to meet obligations undertaken in a contract with a host State (pacta sunt servanda) is qualitatively different, when the investment relates to an infrastructure project that affects directly the community involved and carries with it significant risks to human health; "given the nature of the [p]roject, the issue of investor responsibility in this case must be assessed in the context of sustainable development and human rights".[313] There was reference to UN CESCR and its recognition of access to clean water as a basic human right.

Furthermore, *amici* presented an analysis of the facts with an emphasis on investor's own acts and omissions and investor's failure to exercise proper due diligence to determine the feasibility and viability of its investment in the pre-establishment phase, supporting that investor's (mis)conduct can affect the validity of investor's claims.[314] They pointed out that investor's previous experience in water supply, treatment and sanitation operations in other developing countries demonstrated that the investor was aware of "the notorious state of financial and operational data on water systems in developing countries".[315] Finally, they argued that the host state acted "under its obligations under human rights law to ensure access to water for its citizens".[316] The tribunal found the Amici's observations useful and informative and stated that, where relevant, specific points arising from the Amici's

[311] Specifically, the amici were the Lawyers' Environmental Action Team (LEAT), the Legal and Human Rights Centre (LHRC), the Tanzania Gender Networking Programme (TGNP), the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD). Biwater v. Tanzania, Award, at para 57.
[312] Biwater v. Tanzania, Award, at paras 371-376.
[313] Id., at paras 377-380.
[314] Id., at paras 381 and 389.
[315] Id., at para 382.
[316] Id., at para 387.

submissions were returned to in that context;[317] indeed, the award contains extensive references to amici's submissions.

Considering all the above, the host State invoked human rights in a way at best implicit, while the amici submissions provided extensive IHRL argumentation. Taking into account that the tribunal concluded that the termination of the investment agreement due to investor's poor performance did not constitute a breach of the contract – as the very purpose of that termination was to protect the right to water, it could be argued that the host State defense was successful to a certain extent.[318] Nonetheless, the tribunal found that the occupation of investor's facilities and the usurpation of investment's management control, as well as the deportation of the company's personnel by the host State amounted to an expropriation and a FET standard violation.[319] Therefore, the governmental measures that aimed directly at the protection of the right to access to water were not considered to be in violation of the investment provisions; the measures unrelated to the protection of the access to water (such as the senior managers' deportation) were those that were considered to be in breach of the investment protection standards.

*C. **Aguas Argentinas SA v. Argentina:** invocation of the right to water in support of a necessity defense*

In the case of *Aguas Argentinas SA v. Argentina*, Argentina invoked the human right to water in support of its necessity defense. [320] Namely, Argentina raised a plea of necessity, arguing that the governmental measures were necessary, during the State's severe crisis, "in order to safeguard the human right to water of the inhabitants of the country", and that access to water is not an ordinary commodity but of great importance to the life and health of the population. For these reasons, the Respondent argued that the tribunal must grant the host State "a broader margin of discretion in the present cases than in cases involving other commodities and services" and that the alleged treaty violations, including the violation of the FET standard, should be assessed in the specific context in which the host State acted and that "the human right to water informs that context".[321] The above State's defense was supported by an amicus curiae submission according to which human rights law (the right to water and its linkages

[317] Id., at para 392.

[318] See Kriebaum (2009), supra note 12, at p. 674.

[319] Ibid.

[320] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, Decision on Liability, 30 July 2010 [hereinafter Aguas Argentinas SA v. Argentina, Decision on Liability].

[321] Id., at para 252.

with other human rights, including the right to life, health, housing and an adequate standard of living) provided a rationale for the crisis measures which should be considered by the tribunal while interpreting and applying the treaty provisions.[322]

The tribunal in its analysis and conclusions discussed extensively Argentina's severe crisis, recognizing that "[i]t was characterized by extreme social disturbance, riots, violence, and almost total breakdown of the political system" and citing previous tribunals' decisions on disputes arising out of Argentina's crisis.[323] Nevertheless, it stated that "[t]he severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations", as "given the frequency of crises and emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations", stressing, therefore, that defense's exceptional nature in accordance with the strict conditions imposed by customary international law and applied by the ICJ and other tribunals.[324]

The tribunal, by reference to the host state's and amicus curiae submissions' suggestion that Argentina's human rights obligations trump its obligations under the BIT and that the existence of the human right to water gives Argentina the authority to act in disregard of its treaty obligations, concluded that it "does not find a basis for such a conclusion either in the BITs or international law", although treaty obligation does not exclude necessity defense.[325] The tribunal reaffirmed that the host state is subject to both international obligations, human rights and investment treaty obligations and must respect both of them equally, but found that "[u]nder the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive" and thus, the host State could have respected both types of obligations.[326]

[322] Id., at para 256.
[323] Id., at para 257.
[324] Id., at para 261.
[325] Id., at para 262.
[326] Ibid; See also *"Chapter IV. International Investment Law: Access to Water"*, in Rosalien Diepeveen, Yulia Levashova, & Tineke Lambooy. (2014), at pp. 148-9; It is worth pointing out that the IACtHR, in the *Sawhoyamaxa Community* case, recognized "a higher hierarchy or, at least, a preferred standard of application of the IACHR over the BIT".

D. Saur v. Argentina: *tribunal's recognition of the right to water as part of the general principles of international law*

Similarly, in the *Saur v. Argentina* case, the Respondent argued that its obligations under the investment treaty should be interpreted by the tribunal in harmony with human rights norms, and respective State's obligations, under the human rights treaties and the host State's Constitution, and, in particular, with the protection of the right to water.[327] Argentina supported that governmental measures aimed at the protection of this basic right cannot be characterized illegitimate or expropriatory.

The tribunal reaffirmed that human rights in general and the right to water, particularly, constitute one of the sources that the tribunal must take into consideration in order to settle the dispute, since these rights enjoy constitutional protection in the host State's legal system and, in addition, form part of the general principles of international law.[328] Moreover, the tribunal stated that access to safe and clean drinking water constitutes a basic public service for the State and a fundamental right of the citizens, citing the Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.[329] Indeed, the tribunal supported that the law should grant to public authorities legitimate functions of planning, supervision, police, sanction, intervention and even rescission in protection of the general interest.

Nonetheless, the tribunal's position was that the right to water and investor's protection under the investment treaty "operate on a different plane": the concessionaire of a basic public service finds itself in a situation of dependence on the host State's public administration, which has special authority to guarantee the enjoyment of the right to water.[330] However, the exercise of these State's powers must be combined with respect for the investors' rights and guarantees under the investment treaty. Therefore, if the public authorities decide to expropriate an investment or deny a fair and equitable treatment, in violation of the investment treaty, the investor will be entitled to compensation.[331]

[327] SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (Spanish), 6 June 2012, at para 328.

[328] Id., at para 330.
[329] Ibid, footnote 354.
[330] Id., at para 331.
[331] Ibid.

E. Concluding Remarks

In all above cases, despite the differentiation in tribunals' analysis based on the facts of each case, all tribunals refer to and recognize the right to water, although there is no such a comprehensive right to water in human rights conventions. The non-binding character of the General Comment of the CESCR has not affected the arbitral tribunals; the tribunal in *Saur* case, indeed, cited the Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.[332]

The host States invoked their human rights obligations either by invoking expressly their obligation to protect the human right to water (in *Aguas Argentinas SA v. Argentina* and in *Saur v. Argentina*) or by reference to ECtHR jurisprudence in regard of their margin of appreciation under international law in deciding how best to protect basic public services (an indirect invocation of human rights in *Biwater v. Tanzania*) and general invocation of human rights treaties in regard of their obligation to protect consumers' rights (in *Azurix v. Argentina*). It is apparent that in the most recent cases (*Aguas Argentinas SA v. Argentina* and *Saur v. Argentina*) the host State referred to and invoked expressly its obligation to protect the human right to water and the tribunal recognized also expressly the right to water as forming part of the general principles of international law that must be taken into consideration (in *Saur v. Argentina*). Thus, we can observe an evolution in the host State human rights argumentation, whereas at the beginning such a human rights argumentation was provided only by the amicus curiae submissions. Last but not least, amicus curiae submissions, when accepted, provided essential human rights argumentation, especially when there was not such a development in the host State case.[333] Indeed, in the case of *Azurix v. Argentina* (where

[332] This Report, that reviews international human rights obligations related to the provision of safe drinking water and sanitation, was submitted pursuant to Human Rights Council decision 2/104 of 27 November 2006 on human rights and access to water. UN Human Rights Council. A/HRC/6/3. 16 August 2007. Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, available at: http://www2.ohchr.org/english/issues/water/iexpert/docs/A-CHR-6-3_August07.pdf

[333] The tribunal, in the case of *Aguas de Tunari v. Bolivia* dismissed the amicus curiae submission stating that "[t]he Tribunal's unanimous opinion [is] that your core requests are beyond the power or the authority of the Tribunal to grant. The interplay of the two treaties involved [the ICSID Convention and the Netherlands-Bolivia BIT] […] and the consensual nature of arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non parties and, a fortiori, to the public generally; or to make the documents of the proceedings public" and further arguing that the Tribunal "is of the view that there is not at present a need to call witnesses or seek supplementary non party submissions at the jurisdictional phase of its work". Aguas del Tunari, SA v. Bolivia, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 October 2005, at paras 17-18; See also Aguas del Tunari, SA v. Bolivia, ICSID Case No ARB/02/3, Petition by NGOs and people to participate as an intervening party or amici curiae, 29

there was no amicus curiae submission), one of the reasons for the tribunal's "unenthusiastic attitude towards resorting to human rights instruments" was the "lack of sufficiently elaborated arguments" by the host State.[334]

4.2.2. Host State's Invocation of the WHO Framework Convention on Tobacco Control in *Philip Morris v. Uruguay*: an invocation of the right to health

Vadi recognized that "tobacco control is a fundamental aspect of contemporary public health governance", yet he chose to explore the conceptualization of tobacco control not as a policy objective but as "a component of the right to health", arguing that tobacco control can be seen as a human rights issue.[335] In this respect, the landmark arbitral award issued in July 2016, in the case of *Philip Morris v. Uruguay*, has been hailed as a victory of public health measures against investors' commercial interests. Philip Morris brought a claim before investor State arbitration alleging violation of its treaty rights (impairment of use and enjoyment of investments, expropriation and violation of the FET standard, among others) by Uruguay's tobacco control measures. The tribunal rejected all investors' claims.

In 2000, Uruguay's General Directorate of Health participated in the creation of the National Alliance for Tobacco Control. This "interdisciplinary non-governmental organization, with members drawn from various sectors of the public health community, including governmental, parastatal, local and international, and academics" aimed at the promotion of Uruguay's participation in the Framework Convention on Tobacco Control" and it operated until 2006.[336] In 2004, the Ministry of Public Health formed the National Advisory

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August 2002; Thielborger argued that violation of substantive human rights can occur by the denial of procedural rights, so a possible violation of the right to water is a procedural one. Thielborger, P. (2009), at p. 505; There is no final award in the case of *Aguas de Tunari v. Bolivia*, since the arbitral procedures were discontinued at the parties' request. For the outcome of the dispute see [id] at p. 499.

[334] Hirsch, M. (2009), supra note 2, at p. 106.

[335] Vadi, V.-S. (2009). Reconciling the Public Health with Investor Rights: The Case of Tobacco. In: Dupuy, P.-M., Francioni, F., Petersmann, E.-U. (eds) *Human Rights in International Investment Law and Arbitration*, 452-486, International European Law, & RS: FdR RvdM Glob. en Mensenrecht, at p. 453; Article 12 of the ICESCR provides that "[t]he States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"; See also Meier, B. M. and Mori, L.M. (2005). The Highest Attainable Standard: Advancing A Collective Human Right to Public Health. *Columbia Human Rights Law Review 37: 101*, 101-147.

[336] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award, 8 July 2016 [hereinafter Philip Morris v. Uruguay, award], at para 79.

Commission for Tobacco, "a governmental entity made up of experts from the public sector, civil society, and representatives of medical associations".[337] The role of the Commission was to provide technical support to the Ministry of Public Health in the process of evaluation of the efficacy of current smoking-related policies, and the monitoring of law implementation. Indeed, tobacco companies were also invited and took part in tobacco control policy by submitting recommendations.[338] All above resulted in the Government's adoption of the 80/80 Regulation, which imposed an increase in the size of graphic health warnings appearing on cigarette packages, and the "Single Presentation Requirement" precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family.[339]

Uruguay argued that the challenged governmental measures were adopted in compliance with its international obligations, including the investment treaty, in protection of public health.[340] In fact, in 2004, Uruguay ratified the Framework Convention on Tobacco Control (FCTC), a multilateral treaty drafted under the auspices of the World Health Organization (WHO) in 2003.[341] According to the Respondent, the governmental measures did not constitute an expropriation, instead "they were legitimate exercise of the State's sovereign police power to protect public health". Uruguay also supported that investor's misconduct, namely fraudulent behaviour or behaviour in bad faith, prevented it from bringing a FET claim, on the basis of the maxim *ex dolo malo non oritur action* (an action of law does not arise from evil deceit). Namely, Uruguay argued that the governmental measures "were made necessary and appropriate by the actions of the tobacco industry itself" and that it was the investor's conduct that led to the adoption of the challenged measures.[342] The host State invocated the unclean hands doctrine as "inherent in the notion of equity".[343] Moreover, in regard of investors' legitimate expectations, Uruguay argued that especially "in light of widely accepted articulations of international concern for the harmful effect of tobacco", investors' expectations "could only have been of progressively more stringent regulation of the sale and use of tobacco products".[344] In support of State's defense, the WHO and the FCTC Secretariat submitted their *amicus* brief, arguing that "the Uruguayan measures in

[337] Id., at para 80.
[338] Id., at para 81.
[339] Id., at para 9.
[340] Id., at para 13.
[341] Id., at para 94.
[342] At paras 384-385.
[343] Ibid.
[344] Id., at para 430.

question are effective means of protecting public health, not interference with foreign investment".[345]

The Claimant stressed the lack of any provision in the applicable BIT providing for "carve-outs, exceptions or saving presumptions for public health or other regulatory actions".[346] However, the tribunal supported that the investment treaty must be interpreted in accordance with Article 31 (3) (c) of the VCLT requiring the treaty provisions to be interpreted in the light of any relevant rules of international law applicable to the relations between the parties, including customary international law.[347] The tribunal recognized that the police powers doctrine has been applied in several previous cases to reject claims challenging regulatory measures designed to protect public health, citing the *Bischoff* case and the *Methanex v. USA* case, where the tribunals rejected investors' claims, when the governmental measures were enacted in accordance with due process, in a non discriminatory way and for a public purpose.[348] Moreover, the tribunal noted that the investment treaty provided in Article 2(1) that host States can refuse to admit investments "for reasons of public security and order, public health and morality" while, additionally, the tribunal provided examples from relevant provisions – exceptions for the protection of health - contained in recent trade and investment treaties (the 2012 U.S. Model BIT, the 2012 EU-Canada CETA and the EU-Singapore FTA), in support of the police powers doctrine.[349] The tribunal argued that these provisions reflect the position under general international law.[350]

The tribunal emphasized repeatedly that Uruguay's Law on Tobacco Control and the subsequent governmental measures were expressly adopted in fulfillment of State's international obligations under the FCTC, an international convention that guarantees the human right to health.[351] It further supported that the "margin of appreciation" is not only a concept applied by the ECHR but also to claims arising under investment treaties, at least in contexts such as public health.[352] Finally, the tribunal concluded that the governmental measures were a valid exercise by the host State of its police powers for the protection of

[345] Id., at para 38.
[346] Id., at para 184.
[347] Id., at para 290.
[348] Id., at para 298.
[349] At paras 291 and 300; See also previous *"Human Rights Provisions or References in the International Investment Agreement"* Chapter 2 (C).
[350] Philip Morris v. Uruguay, award, at para 301.
[351] See [id.] at paras 304, 395; Namely, Uruguay's Law on Tobacco Control provided that its object "is to protect the inhabitants of the country from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to second-hand smoke," stating that measures have been taken in accordance with the WHO FCTC. Id., at para 395.
[352] Id., at para 399.

public health and it rejected the investor's expropriation claim.[353] In addition, the tribunal dismissed investor's claim of FET standard violation, as it had already reached a conclusion, it found that there was not need to examine the host State's objection that investors are prevented from bringing a FET claim due to their alleged misconduct.[354]

Finally, it is worth mentioning that the tribunal recognized in a positive way the host State's adhesion to the international treaty and the efforts made towards the proper implementation of its obligations under the FCTC, given the host State's initial lack of scientific knowledge and market experience, emphasizing that "Uruguay is a country with limited technical and economic resources".[355]

4.2. HOST STATE DEFENSE RELIANCE ON DOMESTIC HUMAN RIGHTS-ENVIRONMENTAL PROVISIONS AND INTERNATIONAL HUMAN RIGHTS LAW ARGUMENTATION BY THE AMICI

The present Chapter, as explained above, analyses four mining disputes brought before investment arbitration. The host States, in their defense cases, relied primarily on their domestic human rights and environmental provisions, while extensive international human rights law argumentation was provided by the amici, where amicus briefs have been submitted.

A. *The Glamis Gold v. United States case*

The case of *Glamis Gold v. USA* concerned host State's measures with regard to open-pit mining operations.[356] The challenged measures, that imposed various obligations to clean up the mining area, were designed to mitigate the damages for the environment and the Native American cultural sites of the Quechan Indian Nation. The investor argued that compliance with environmental regulations made the value of its investment worthless, resulting in the

[353] Id., at para 307.
[354] Id., at para 435.
[355] Id., at para 393.
[356] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009 [hereinafter Glamis Gold v. United States, Award]

expropriation of its investment and in violation of the FET standard protection (Articles 1105 and 1110 of NAFTA). The tribunal found no violations.[357]

The main point of host State's defense argument was to justify the regulatory power of the State of California.[358] To this end, the host State's defense – in essence, a human rights defense based on the protection of the environment and Native American rights – relied almost entirely on federal and state laws.[359] In fact, the host State's domestic regulatory framework, relevant to the dispute, included a series of Federal and California Laws and Policy and Management Acts providing, *inter alia*, for the protection of the environment, the protection and conservation of resources, a balance between mining interests and other potential competing land uses, management of public lands "under principles of multiple use and sustained yield", prevention of any unnecessary or undue degradation of the public lands by mining operations, protection of public health and safety, a previous consultation with affected Indian tribes requirement and protection of historic, cultural and sacred sites. While the host state domestic Mining legislation reaffirmed the host State's encouragement of

[357] Namely, the tribunal found that the Claimant failed to prove any sufficient economic impact on its investment, thus it found that the governmental measures did not amount to an expropriation. Moreover, the tribunal denied a violation of the FET standard, after setting and applying the high threshold of the *Neer* case, meaning the minimum standard of treatment in customary international law, as codified in Article 1105 of NAFTA. See Kriebaum, U. (2009), supra note 12, at p. 674; In the *Neer v. Mexico* Opinion of 1926, the Mixed Claims Commission issued the following statement in regard to the circumstances under which a host State would be liable for a violation of the minimum standard of treatment: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency", while, according to NAFTA Free Trade Commission's official interpretation, Article 1105 (1) of the NAFTA reflects the customary international law minimum standard of treatment of aliens and "does not require treatment in addition to or beyond that which is required by customary international law". NAFTA tribunals have also accepted this interpretation. Dozler and Schreuer (2012). *Principles of International Investment Law*. Oxford University Press. 2nd edition, at pp. 3-4 and 134-139; See the tribunal's extensive analysis in Glamis Gold v. United States, Award, at paras 598-627.

[358] Cantegreil, J. (2009). Implementing Human Rights in the NAFTA Regime – The Potential of a Pending Case: Glamis Corp v USA. in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration*. Oxford: Oxford University Press, 367-395, at 385.

[359] Namely, the relevant domestic regulatory landscape: the Mining Law of 1872; the Mining and Minerals Policy Act of 1970; the Federal Land Policy and Management Act of 1976; the California Desert Conservation Act Plan providing for the establishment of Areas of Critical Environmental Concern; the 3809 Regulations that establish procedures and standards for the prevention of undue and unnecessary degradation of public lands by mining operations and relevant responsibility of mining claimants and operators for adopting responsible and adequate measures towards this aim; the National Environmental Policy Act; the California Environmental Quality Act that provides for an Environmental Impact Report requirement for projects that may have a significant effect on the environment and responsible agency's feasible alternatives or mitigation measures to lessen significant environmental impacts; the California Surface Mining and Reclamation Act; the National Historic Preservation Act; the Federal Legislation to Protect Native American Culture; California Legislation to Protect Native American Culture; the Native American Historical, Cultural and Sacred Sites Act. Glamis Gold v. United States, Award, at paras 36-84.

mining on federal lands and respect for mining claims, at the same time it emphasized that those existing or potential rights (both of operators and claimants) should be limited and subject to regulations.

The host State also referred to international instruments that protect historic and cultural properties.[360] Namely, the host State invoked the United Nations Educational, Scientific and Cultural Organization (UNESCO) conventions and declarations regarding the protection and preservation of cultural property and its 1968 Recommendation in regard of the Preservation of Cultural Property Endangered by Public or Private Works, that recommends member States to take whatever legislative or other measures are necessary, both preventive and corrective, "in order to preserve, salvage, or rescue cultural property".[361] Secondly, the host State referred to the World Heritage Convention (WHC), ratified by the United States and incorporated into the national law, according to which "the destruction of any cultural site impoverishes 'the heritage of all the nations of the world'".[362] Moreover, the host State stressed that as a member state to that convention has an international obligation "to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes," and to enact "appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.".[363] However, although IHRL establishes special protections for indigenous people, such as the protection of the right to land and natural resources of indigenous people, no reference was made by the State to international human rights law and State's international obligations to protect indigenous peoples' rights.[364]

Nonetheless, extensive human rights arguments were provided by the amicus curiae submissions. In that case, the tribunal accepted an amicus brief for the Quechan Indian Nation. The amici supported that the tribunal should interpret NAFTA provisions in accordance with relevant international humans rights norms, including "extensive

[360] Id, at paras 83-84.
[361] Id., at para 83.
[362] Id, at para 84.

[363] Glamis Gold v. United States, Award, at para 84.
[364] See the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (in Articles 13-19) and the 2007 UN Declaration on the Rights of Indigenous Peoples (in Articles 25-30); Although the 2007 UN Declaration is not binding per se, it has obtained worldwide support and, in combination with existing legally binding norms, is setting the basis for current customary international law on the indigenous peoples' rights. See European Center for Constitutional and Human Rights (ECCHR) (July 2012). Human Rights Inapplicable in International Investment Arbitration? A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal, at p. 5.

international protections of the rights of indigenous peoples with regard to their cultural and religious rights and land rights".[365] Harrison, writing before the issuance of the award, had expressed his concerns regarding the pending tribunal's position in regard of the relevance of amici claim (and international human rights law) to deciding the dispute.[366] In fact, the tribunal in its "understanding of its task", although it recognized that "it should address those [amici] filings explicitly in its Award to the degree that they bear on decisions that must be taken", it concluded that "given the Tribunal's holdings, however, the Tribunal does not reach the particular issues addressed by these submission".[367] It is surprising, what Kriebaum first noticed, that "[n]either the word human rights nor any reference to the human rights instruments referred to in the amicus curiae submission can be found in the Award".[368] Furthermore, the tribunal did not make any reference to States' international obligations to protect cultural rights under the WHC, despite the relevant host State's references.[369]

B. *The Pac Rim v. El Salvador Case*

The *Pac Rim v. El Salvador* case also concerned a mining project. The dispute in that case arose after El Salvador's denial to Pac Rim of the concession and the new environmental permits for exploration and a subsequent de facto ban on all metallic mining projects, including Pac Rim's El Dorado mining project.[370] According to the investor, the host State's

[365] Harrison, J. (2009). Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice? In: PierreMarie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration.* Oxford: Oxford University Press, 396-421, at pp. 408-9.
[366] Ibid.

[367] At para 8; Already in its Decision on Application and Submission by Quechan Indian Nation, the tribunal had stated that "the granting of leave did not require the Tribunal to address the submission at any point in the Arbitration, nor did it entitle a non-disputing party to make further submissions in the Arbitration", at para 274.
[368] Kriebaum, U. (2009), supra note 12, at 676.
[369] Cultural rights were considered by the tribunals in the cases of *SPP v. Egypt* and *Parkenings v. Lithuania*, under the UNESCO World Heritage Convention: In the case of *SPP v. Egypt*, which concerned the termination of large-scale touristic complexes and facilities within an area that that was included in the World Heritage List, the tribunal declared the WHC relevant as applicable law and it supported that "investors should take notice of host states' WHC obligations" and "become aware of the possible cultural and natural sensitivity of the areas where they implement their activities; if they decide to go along with their projects in such areas, this is just a matter of typical business risk which is not recoverable by way of investor-state proceedings". Pavoni, R. (2009), supra note 16, at pp. 536-7; In the case of *Parkerings v. Lithuania*, the tribunal relied on the World Cultural Heritage (that was applied to the old city centre in Vilnius) to demonstrate that no discrimination had occurred in that case: "[t]he designation was used to support the legitimacy of the distinction adopted by the Municipality of Vilnius between two proposed municipal car parking projects, one that impacted upon the designated area and one that avoided any such impacts". Mann, Howard. (2013). Reconceptualizing international investment law: Its role in sustainable development. *Lewis & Clark Law Review, 17*(2), 521-544, at p. 26.

[370] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Award, 14 October 2016 [hereinafter Pac Rim v. El Salvador, Award]

representatives directly induced and encouraged the Claimant's investment of tens of millions of dollars between 2002 and 2008 in exploration and mining development in El Salvador.[371] As a result, the investor claimed that it had reasonable and legitimate expectations that its mineral rights would be honored by the host State and that it would be allowed to exploit minerals in the designated areas, yet the host State illegitimately deprived the investor of the value of its significant investments in El Salvador, by sweeping aside the legal and regulatory regime upon which the investor had relied.[372] The tribunal dismissed on their merits all the investor's pleaded claims of expropriation and FET standard violation (and requested damages of US$284 milllion); instead, it ordered the investor to pay to El Salvador the total amount of US$8 million towards the latter's legal costs.[373]

In fact, in April 2007, the Ministers of Environment and Economy publicly notified the mining industry representatives that "metallic mining would be put on hold until after completion of a 'strategic environmental assessment'".[374] The host State's Investment and Mining Laws provided for different processes and licenses required for the different stages of a mining project, such as authorization for carrying out mining activities, exploration license and, subsequently - upon conclusion of proof of the existence of the mining economic potential in the authorized area - concession of exploitation of mines and quarries after acquiring an environmental permit and submitting a feasibility study.[375] In particular, under the Mining Law, Pac Rim should also meet the requirement to show land ownership or authorization from the surface landowners for the requested concession area.[376] El Salvador argued that the investor did not meet the requirements of the applicable Salvadoran Mining Law.[377] Namely, the host State in its Counter-Memorial on the Merits, supported that the investor's claims must fail, as the investor did not have a right to a mining exploration concession or to the exploration license, it was not entitled to an environmental permit for exploration, it did not earn the necessary social license to operate (meaning the approval of

[371] Id., at para 3.6.
[372] Ibid.
[373]Id., at para 11.20.
[374] Pac Rim v. El Salvador, Award, at para 3.13.
[375] Id., at paras 2.28-2.35
[376] Id., at para 3.21; Indeed, the requirement of authorization from the surface landowners formed a significant part of the dispute, as each of the Parties supported a different interpretation of the Salvadoran Mining Law. The host State supported that authorization to use the entire area of the concession was required, implying that Pac Rim should obtain authorization from every surface owner within the proposed concession. On the other hand, the Claimant supported that authorization was required only for the impacted areas and not for the entire area of the concession. At paras 3.21, 6.26, 6.30, 6.31, 8.35.
[377] Id., at para 7.4.

the local communities), and thus, all investor's claims under the host State's Investment Law were without merit.[378]

Furthermore, the host State's defense was based on its Constitution, which explicitly provided for human rights, the social role of the right to private property, environmental protection, and sustainable development. *Inter alia*, Article 1 of the Constitution of El Salvador provided that "… it is the obligation of the State to guarantee the inhabitants of the Republic the enjoyment of liberty, health, culture, economic wellbeing and social justice", while Article 65 recognized the health of the inhabitants of the Republic as a public good that the State is obliged to safeguard. Moreover, Article 117 provided that it is the State's duty to protect natural resources, as well as the diversity and integrity of the environment to ensure sustainable development. In addition, the Constitution and the Mining Law recognized the rights of the owners of surface land; the Mining Law granted the owner of surface land the right to be compensated for damages caused by exploration and exploitation activities.[379]

In parallel, the host State's Investment Law contained provisions on foreign investors' responsibilities. Namely, according to Article 5, "foreign investors and the commercial companies in which they participate shall enjoy the same rights and be bound by the same responsibilities as local investors". Indeed, under the applicable Salvadoran Law, the interpretation and application of the Mining Law could involve the Constitution, the Environmental Law, the Mining Regulations, and general principles of administrative law.[380]

Therefore, the host State in its defense made no reference at all to international human rights law, and relied for its defense on Salvadoran law, which, in fact, it considered that applies exclusively. In other words, the host State supported that Salvadoran law applies to the exclusion of relevant rules of international law, thus, the host State's litigation strategy

[378] See Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, The Republic of El Salvador's Counter-Memorial on the Merits (Spanish), 10 January 2014; The Salvadoran Law's 'social license' requirement to operate reflects affected communities' right to consultation and consent, a right developed initially in the context of indigenous people's rights, whose linkage to the land is often critical to their existence. The right to consultation and consent is articulated in the requirement for the States' governments to obtain "free, prior and informed consent" of indigenous peoples before granting permission for the realization of a project that affects them. However, as indigenous peoples are not the only ones to be affected by megaprojects, the requirement of previous consultation and consent has been expanded over time to apply to affected 'local communities' in general. See Kanosue, Y. (2015). When Land is Taken Away: States Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities. *15*(4), 643-667.

[379] De Schutter writes that the right to land, in certain contexts and for certain beneficiaries, may be seen as a self-standing right, whether it is protected as an element of the right to property or whether it is a component of the right to food. De Schutter, O. (2010). The Emerging Human Right to Land. *International Community Law Review, 12*(3), 303-334, at p. 305-6.

[380] Pac Rim v. El Salvador, Award, at para 7.6.

could not be IHRL based.[381] The investor, on the other hand, argued that the companies' application complied fully with both host State laws and international law and North American good practices for engineering design and environmental management, and supported that the denial of its environmental permits was the result of a bureaucratic morass in the Ministry of Environment, charged with issuing all environmental permits, and the host State's decision to ban all mining projects, irrespective of investor's conduct.

Again, in that case, the only human rights arguments with references to international human rights law were provided by the CIEL's amicus curiae submissions.[382] CIEL advanced a legal case arguing that measures adopted by the host State regarding the investor's mining project were supported by the host State's international obligations on human rights and the protection of a healthy environment.[383] Namely, CIEL argued (as cited in the award) that:

> Contemporary international law enshrines human rights obligations relating to environmental protection. These obligations protect the right to live in a healthy environment, the right to health and a life of dignity, the right to property and lands, and the right to water and food, among other human rights. These rights are fundamental to the attainment of the sustainable development of the territory and to the protection of the local communities that reside therein. The implementation by the state of a normative framework designed to protect these rights against the risks posed by extractive industries is supported by international human rights obligations. Especially in a country like El Salvador, who suffers from high population density and scarcity of water resources, the application of legal requirements and administrative processes are indispensable tools for the State to safeguard the rights threatened by extractive industries.[384]

The tribunal considered it unnecessary to summarize or address the *amicus* case more fully, supporting that "the tribunal's decisions in this award do not require the tribunal specifically to consider the legal case advanced by CIEL and, in the circumstances, it would be inappropriate to do so". Nonetheless, the tribunal took into consideration experts' opinions on the case, who referred to the nature of mining operations as posing "dangers that may have an impact on people's lives, health or assets" and the requirement of consent of all owners who might be affected by the mining operations.[385] The tribunal found that the investor "took no steps to identify any such areas that were or were not subject to such potential risks. It

[381] In regard of the disagreement between the parties for the application or not of relevant rules of international law, the tribunal decided that it must apply Salvadoran law and also rules of international law as may be applicable to the Parties' dispute, confirming "the parallel application and corrective function of international law in relation to domestic law". Id., at paras 5.6-5.62.

[382]Id., at paras 3.28-3.30.

[383] Ibid.

[384] Id., at para 3.29.

[385], Id., at paras 8.36-8.37.

adhered to the view that there were no potential risks at all [and] [i]n this regard, it was mistaken".[386]

It could be argued that the amicus legal case and the international human rights framework utilized, although not directly addressed by the tribunal, appeared valuable to the considerations of the tribunal and the tribunal's final decision, which took into consideration, even by reference to experts' opinions, the risks posed by extractive industries to local communities' human rights, and reaffirmed the requirement of previous consent of the affected owners. Yet, the tribunal made no explicit reference to States' obligations under international human rights and environmental law in its analysis, although it had decided that relevant rules of international law are applicable to the dispute.[387]

C. State's Environmental Counterclaim in the Perenco v. Ecuador case

The case of *Perenco v. Ecuador* is a particular one and still pending. Although it relates to a mining project, the challenged governmental measure is neither an environmental regulation nor a termination of the mining concession contract, but a 99 per cent tax on investor's windfall oil profits.[388] Moreover, its particular significance lies on the fact that the host State brought an environmental counterclaim before the arbitral proceedings. In its decision on liability, issued in 2014, the tribunal found that the tax breached the Ecuador-France BIT and the concession contracts, however it concluded that was not in a position yet to consider granting the relief sought by the Claimant, since the Respondent had brought a counterclaim.[389] Namely, the host State had filed its counterclaim in 2011, alleging that Perenco's operations of oil fields had caused an "environmental catastrophe" in the oil blocks

[386] Id., at para 8.43.

[387] In contrast, in the case of *Maffezini v. Spain*, the tribunal had to assess whether requiring compliance with an environmental impact assessment requirement for a manufacturing facility was contrary to the rights of the investor and it found that it was not. Yet, the tribunal in that case referred expressly to international environmental law in support of the legitimacy of requiring a foreign investor to undertake an environmental impact assessment study prior to establishing its investment. Namely, the tribunal, "in language reminiscent of the human rights concept of the duty to protect", as Mann notes, stated that "[t]he Tribunal has carefully examined these contentions, since the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law". Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (English), 13 November 2000, at para 67, as cited by Mann, H. (2008). *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities.* International Institute for Sustainable Development, at p. 29.

[388] See UNCTAD (2016) IIA Issues Note No. 2: Investor-State Dispute Settlement: Review of Developments in 2015, at p. 36.

[389] Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (English), 12 September 2014 [hereinafter Perenco v. Ecuador, Decision on Liability], at para 713.

situated in country's Amazonian rainforest, in violation of the concession contracts and Ecuadorian environmental law.[390]

Indeed, the host State's legal regime recognized environmental protection and sustainable development as fundamental constitutional imperatives and nature itself as the subject of rights.[391] Among the environmental protections provided were the Ecuadorian peoples' right to a healthy environment, the active participation of affected communities in the planning, implementation and monitoring of all operations causing environmental impacts, the application of the environmental principles of prevention and precaution, a broad concept of environmental harm, the doctrine of strict liability for environmental harm, and the State's obligation to adopt prompt and effective policies and measures in order to prevent environmental damage.[392] Under these provisions, "oil operators in Ecuador are subject to a regime of strict liability for environmental harm and are required to undertake the costs of remediation in full".[393] Thus, Ecuador submitted that, once the tribunal found Perenco liable, Perenco is required "to fully restore the ecosystems […] or pay damages to allow the State to proceed with the restoration process"; in fact, Ecuador sought $2.4 billion in compensation for remediation activities.[394] Furthermore, Ecuador invocated Article 11 (3) of its Constitution that provided that "[t]he rights and guarantees set forth in the Constitution and in human rights international instruments shall be of direct and immediate application by and before any public servant, administrative or judicial, ex officio or upon request by a party.".

Moreover, the significance of the collective right to property was emphasized in the expert report, submitted by the host State, as a matter that should be taken into account by the tribunal, when assessing the costs of remediation.[395] According to the Expert Report, "the environmental action to request redress for harm cannot be classified as equal, in any way to civil action for damages", as "[b]oth protect legal assets of a completely different relevance". More specifically, the Expert argued that the host State's environmental action protects a common good which is essential to humanity's existence, while the civil action for damages

[390] Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6. Interim Decision on the Environmental Counterclaim, 11 August 2015, [hereinafter Perenco v. Ecuador, Interim Decision on the Environmental Counterclaim], at para 34.

[391] Id., at para 70.
[392] Ibid.
[393] Id., at para 76.
[394] Id., at para 571.
[395] See the Annex No. 29 to Expert Report of Fabian Andrade Narvaez, cited in Perenco v. Ecuador, Interim Decision on the Environmental Counterclaim, at para 361, footnote 892.

protects legal assets related to the property of the individual that, although important, cannot be considered as having the same value and significance as the collective right to property.[396]

The tribunal, already at the beginning of its analysis, referred to international law, recognizing that "a State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields".[397] The tribunal affirmed that "[a]ll of this is beyond any serious dispute" and stated that it "enters into this phase of the proceeding mindful of the fundamental imperatives of the protection of the environment in Ecuador."[398] Moreover, the tribunal took into consideration that the host State Constitution's recognition of nature as the subject of rights itself and the codification of the principles of sustainable development and the right to a healthy environment were background values central to the host State's case that relied on them to establish the full extent of environmental remediation.[399] In the light of the above and the host State's focus on environmental protection, the tribunal held that "when choosing between certain disputed (but reasonable) interpretations of the Ecuadorian regulatory regime, the interpretation which most favours the protection of the environment is to be preferred".[400] Finally, the tribunal, finding itself unable to determine the extent of actual environmental damage, decided to appoint an independent expert to investigate the matter, that would be "solely answerable to the tribunal, in order to ensure complete independence and impartiality.[401]

Despite the host State's defense reliance on national human rights and environmental provisions, in the pending case of Perenco v. Ecuador, the relevance and significance of international human rights and environmental law is evident in the interpretation of the host State's constitutional provisions (which incorporate international human rights norms), in the experts report and in the tribunal's analysis.

D. Environmental Provisions in the FTA: the case of Al Tamini v. Oman

The *Al Tamini v. Oman* case concerned an investment for the development and operation of a limestone quarry- a mining project.[402] The investor complained of being subjected to

[396] Ibid.
[397] Id, at para 35.
[398] Ibid.
[399] Id., at para 209.
[400] Id., at para 322.
[401] Id., at para 588.
[402] Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, 3 November 2015 [hereinafter Al Tamini v. Oman, Award].

harassment and unwarranted sanctions by the the host State environmental and other authorities and the subsequent termination of its quarry lease agreements, in violation of the guarantees against expropriation, the minimum standard of treatment and the NT requirement, under the Oman-United States Free Trade Agreement. In particular, the alleged harassment included the arrest and prosecution of the investor, the police coercion of the investor to sign an undertaking to refrain from further production at the quarry and the forced dispersal by the police of investor's workforce and physical assets.[403] The host State's case was that the actions of its organs were the legitimate response against investor's violations of national environmental laws. The tribunal dismissed all investor's claims for violations of the US-Oman FTA.[404]

The significant part of the tribunal's analysis, in Al Tamini v. Oman award, in regard of human and environmental rights, was the tribunal's interpretation of the minimum standard of treatment. Namely, Article 10.5 of the applicable FTA provided that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security".[405] In addition, Article 10.10 of the FTA provided that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The tribunal considered Article 10.10 relevant in determining investor's claim and noted that the explicit provisions contained in the FTA indicated "a high premium" placed by the parties on the protection of the environment, interpreting the wording of Article 10.10 as providing "a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is 'undertaken in a manner sensitive to environmental concerns', provided it is not otherwise inconsistent with the express provisions of Chapter 10".[406]

Moreover, the US-Oman FTA contained a whole Chapter, Chapter 17, entitled "Environment". The tribunal considered that although Chapter 17 did not fall directly within

[403] Id., at para 350.

[404] Id., at para 474.

[405] Article 10.5 of the US–Oman FTA. The same article provided further that: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." Al Tamini v. Oman, Award, at para 377.

[406] Id., at para 387.

its jurisdiction, yet it provided "further relevant context in which the provisions of Chapter 10 must be interpreted".[407] The tribunal took into consideration that both parties agreed that Chapter 17 provided relevant interpretative context in considering and applying the provisions of Chapter 10, arguing further that this approach was consistent with the FTA's governing law clause, which stated that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law".[408] Thus, the tribunal concluded that, although its jurisdiction is limited to determining an alleged breach of the obligations specified in Article 10.15 regarding the "Submission of a Claim to Arbitration" (subject matter jurisdiction) and no other provisions of the FTA, it must, while interpreting and applying the provisions of Chapter 10, read them in the context and purpose of the FTA as a whole.[409] More specifically, the tribunal referred to Article 17.2.1. according to which:

> (a) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
>
> (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

The tribunal, taking into account the above, concluded that the environmental references within the FTA are indicative of the importance, attached by the States parties to FTA, to the enforcement of host State environmental laws.[410] The tribunal found that the US and Oman intention "to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws" was clearly defined in the FTA, referring further, in support of its analysis, to the Preamble of the FTA that stated that one of the treaty's objectives is the desire to ""strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation".[411] The tribunal recognized the above references to

[407] Id., at para 388.
[408] Id, see footnote 776.
[409] Ibid; See also Chapter 1.3. (C) *"Human Rights and Environmental Provisions or References in the Investment Agreement"* of the present paper.
[410] Id., at para 389.
[411] Id., see footnote 777.

environmental protection in the Preamble of the FTA as clear manifestation of the State parties' consent that the FTA "is to be interpreted to give effect to the objectives of environmental protection and conservation".[412] Finally, the tribunal concluded that it "must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty" to assess any breach of the minimum standard of treatment.[413]

Taking all the above into account along with the investor's case that relied largely upon instances in which the host State authorities had given inconsistent advice regarding his investment, the tribunal was not convinced that the host State's impugned conduct violated the minimum standard of treatment, instead it considered it to be a "good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment".[414] Last but not least, the tribunal argued that the evidence showed the investor's misconduct, and it attributed investor's "own misfortune" to his "willful disregard of Oman's environmental laws".[415]

E. Concluding Remarks and Further Considerations

In all the above presented cases, the host State defense relied primarily on domestic human rights and environmental provisions. Indeed, in the majority of the cases, the host States had a strong domestic regulatory framework to rely on, which incorporated international human rights and environmental norms. In the case of *Glamis Gold v. United States*, the host State referred to international instruments aimed at the protection of historic and cultural property, but only in a supplementary way, making no explicit reference to international human rights law and the special protection provided for indigenous people. In the case of *Pac Rim v. El Salvador*, the host State relied exclusively on the Salvadoran Mining Law and its Constitution, whose articles codified human rights, environmental and sustainable development principles. Then, in the case of *Perenco v. Ecuador*, the host State relied on the Ecuadorian Environment Law, whose provisions reflected international environmental principles, and its Constitution, which provided explicitly that rights and guarantees set forth in human rights international instruments shall be of direct and immediate application. Finally, in the case of *Al Tamini v. Oman*, the host State defense, similarly, was based on national environmental laws.

[412] Ibid.
[413] Ibid.
[414] Id., at para 390.
[415] Id., at para 474.

The tribunals in the first two cases made no explicit reference to international human rights law- following the parties' position. By contrast, the constitutional provision invoked by El Salvador (that provided that rights and guarantees set forth in human rights international instruments shall be of direct and immediate application) triggered the tribunal, which referred to international law in its analysis. In all three cases (*Glamis Gold v. United States*, *Pac Rim v. El Salvador* and *Perenco v. Ecuador*) human rights considerations inserted in investor-state arbitration through the applicable host State law, which was the basis of the parties and the tribunal's positions. However, in *Al Tamini v. Oman*, the tribunal focused on the environmental provisions in the free-trade agreement (FTA) and environmental arguments inserted in investor-state arbitration by resource to article 31 (1) and (2) of the VCLT and treaty interpretation in the context and purpose of the FTA as a whole.

Although international human rights law has not enjoyed a dominant position in the host State defense in a direct way, the human rights and environmental provisions of the host State law reflected international human rights and environmental principles, and amicus curiae submissions (in *Glamis Gold v. United States* and in *Pac Rim v. El Salvador*) provided extensive human rights argumentation, indicating how the host State cases could be informed and reinforced by international human rights law (indigenous people rights and the right to a healthy environment). Moreover, the expert's report, in *Perenco v. Ecuador*, inserted the concept of "the collective right to property".

At this point, it is considered essential to emphasize that international human rights law and investment treaties address property issues in different ways. Cotula, recognizing and explaining the different approaches, supports that the two regimes (IHRL and IIL) "pursue different objectives, protect different interests, and reflect different ways to conceptualize property", arguing further that different property concepts (think of the "collective right to property" discussed by the host State expert in *Perenco v. Ecuador*) and claims (think of Ecuador's environmental counterclaim) become now more visible due to the growing commercial pressures on the world's natural resources.[416]

Indeed, there are developments in the protection of property under IHRL that have clarified the normative content of human rights in relation to the protection of property. These developments can be identified not only in the protection of the right to property per se, but also in the protection of the indigenous peoples' rights over their territories, the right to food and housing, the right to a healthy environment and peoples' right to freely dispose of their

[416] Cotula, L. (2015), supra note 15, at p. 114.

natural resources, among others.[417] More specifically, there is significant jurisprudence of the IACtHR on the collective right to property of indigenous people, which emphasizes the spiritual and cultural dimensions of property.[418] Furthermore, the African Charter on Human and Peoples' Rights (known as the Banjul Charter) provides for the protection of collective rights by recognizing, in particular, the peoples' right to freely dispose of their wealth and natural resources and the right to the lawful recovery of the dispossessed peoples' property as well as to an adequate compensation, and, in parallel, States parties' commitment "to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources".[419]

These developments under IHRL could inform the content of IIAs standars and reinforce host State defenses, as long as the States are willing to invoke their international human rights obligations.[420]

[417] Id, at p. 114.

[418] On the other hand, the right to property has been consistently applied by the ECtHR in protection of commercial assets held by corporations. Cotula stressed the fact that the right to property is affirmed in the Universal Declaration of Human Rights but not in the ICCPR and the ICESCR, thus, the protection of the right to property, as a human right, depends on regional human rights systems. Id., at p. 121.

[419] Article 21 of the African Charter on Human and Peoples' Rights (ACHPR), available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

[420] The dispute, in the case of *Gold Reserve v. Venezuela*, had also its origins in a number of mining concessions and mining rights held indirectly by the Claimant in Venezuela, and the termination of these mining concessions by the government (para 3). According to the host State, the massive mining project raised critical environmental issues, since it was to be located in the environmentally fragile Imataca Forest Reserve, which was subject to a special management plan not to degrade the environment and to preserve the rights of indigenous people (para 283). The host State defense relied on its domestic environmental law and Constitution that provided for the protection of the environment and indigenous peoples' rights and the promotion of sustainable development (para 318). Yet, there was no invocation of international human rights law by the host State and, there was no amicus curiae submission to fill the gap. Moreover, the tribunal's analysis was limited to Venezuelan law (para 534). Finally, the tribunal found a violation of the FET standard (para 863). Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

4. FINAL CONCLUSIONS

Concluding remarks and further considerations have been discussed thoroughly at the end of each of the Chapters of the present paper. At this point, I present the main conclusions deriving from the Chapters with regard to the questions raised at the beginning and provide some further considerations resulting from an overview of this study.

A. Frequency and Quality of Human Rights Arguments: Evidence of Change

First of all, the recent cases clearly demonstrate a change in the development of human rights arguments in investor-state arbitration. With regard to the human rights arguments made by the investors, we notice an extensive human rights-based argumentation in the most recent cases brought before arbitral tribunals. Investors have been more than willing to invoke their human rights either as independent human rights claims or in support of treaty violations, and refer to human rights courts jurisprudence to inform the context of the standards accorded to them under the IIA. Indeed, when they brought independent human rights claims, they came up with innovative arguments (See *Roussalis v. Romania* and *Al Warraq v. Indonesia*). Moreover, the recent *Peter Allard v. Barbados* case is the first arbitration, as far as we know, where a claimant invoked the host State's obligation to protect the environment in support of his claims for treaty violations, paving the way for investors' similar human rights arguments in future arbitrations.[421]

By contrast, in the earlier cases (*Biloune v. Ghana*, *Patrick Mitchell v. Congo*, *Dessert Lines Ltd v. Yemen* and *Loewen v. USA*) that concerned investors' human rights violations (arbitrary arrest and detention, illegal seizure of property, unfair trial), investors made no explicit reference to IHRL, limiting their claims to mere exhibition of facts, while they could inform the FET and FPS standards, by invoking, *inter alia*, their right to a fair trial, the prohibition of arbitrary arrest and detention and the right to property.

In regard of the human rights arguments made by the host States, the advancement of human rights argumentation is evident in the water privatization cases. In these cases, the IHRL, and specifically the right to water, informed and reinforced the host State defense. While the host States, at the beginning (see *Azurix v. Argentina*, *Biwater v. Tanzania*), seemed reluctant to invoke explicitly their obligation to protect the right to water, referring generally to their obligations under human rights treaties or to "a moral and perhaps legal obligation" to protect public services, in the most recent cases (see *Aguas Argentinas SA v. Argentina* and

[421] See *Chapter 2.2. (E) Concluding Remarks and Further Considerations* of the present paper.

Saur v. Argentina), they invoked without hesitation the human right to water and their international obligation to protect this human right. *Amicus curiae* submissions are considered to have played an eminent role towards this advancement. Indeed, the *amici* have developed cases exclusively based on IHRL and they were the first to insert the "right to water" in arbitration proceedings (see the *amici*'s fully argued cases submitted in *Biwater v. Tanzania*). This development is even more remarkable, when we consider that there is no such a comprehensive right to water in human rights conventions.

On the other hand, in the mining cases presented, where human rights and environmental issues were at the spotlight, the host States preferred to rely primarily on the host State domestic law to build their defense cases. Despite the absence of references to IHRL, the host States had a strong domestic regulatory framework to rely on, within which human rights, environmental and sustainable development norms and principles were incorporated. Yet, developments in IHRL could inform further the context of domestic human rights and environmental provisions and reinforce the host State defense, safeguarding the human rights of the host State population in a more effective way. This shortcoming was remedied through the *amicus curiae* submissions: the amici pointed out that IHRL establishes special protections for indigenous people (in *Glamis Gold v. United States*) and invoked the right to a healthy environment under IHRL (*in Pac Rim v. El Salvador*). Furthermore, it is worth noting that, in *Perenco v. Ecuador*, IHRL different concept of property (the collective right to property) was introduced in investment arbitral proceedings through the expert's report, submitted by the host State.

Finally, we observed that an easy way out from treaty violations claims for the host States have been the reliance on an international treaty (imposing binding legal obligations to States parties) that – although not a human rights treaty *per se* – reaffirms the human rights of the host State population, either in a direct way (such as the WHO FCTC that reaffirms the human right of all people to the highest standard of health) or in an implicit way (such as the UNESCO WHC that protects historic and cultural property, and accordingly, cultural rights and collective property rights). The investor, in *Peter Allard v. Barbados* case, also relied on international environmental treaties to support treaty violations.

B. Systemic Integration: the Most Common Avenue for Inserting Human Rights Arguments in Investor State Arbitration

The cases presented and analyzed in the present paper indicate that both parties and the tribunals have resorted to Article 31 (3) (c) of the VCLT as the most secure-admissible way to insert human rights arguments in investor-state arbitration. Namely, the host States, when

invoked the human right to water, argued that the alleged IIA's violations should be assessed in the specific context in which the host State acted and that "the human right to water informs that context" (see *Aguas Argentinas SA v. Argentina*); the host State's obligations under the IIA should be interpreted by the tribunal in harmony with human rights norms under human rights treaties (see *Saur v. Argentina*). Similarly, the *amici* supported that human rights law provided a rationale for the challenged governmental measures which should be considered by the tribunal when interpreting and applying the treaty provisions (see *Aguas Argentinas SA v. Argentina*). However, in the majority of the mining cases presented (see *Glamis Gold v. United States*, *Pac Rim v. El Salvador* and *Perenco v. Ecuador*), human rights considerations inserted in investor-state arbitration through the applicable host State law, on which the parties' positions were based; this "avenue" is also in conformity with the "in accordance with the host State law" clause, that places illegal investments outside the scope of protection under an IIA.

Investors have also resorted to Article 31(3)(c) of the VCLT. In the case of *Peter Allard v. Barbados*, the Claimant argued that the FET standard, and accordingly his legitimate expectations, should be interpreted according to Article 31(3)(c) of the VCLT, thus the applicable BIT should be interpreted within the context of any relevant rules of international law applicable in the relation between the parties, including the environmental treaties to which the host State is a party. In the case of *Glamis Gold v. United States*, the *amici* argued that the tribunal should interpret the NAFTA provisions in accordance with relevant international human rights norms.

The tribunals, in their analysis, also resort to the principles of treaty interpretation. Namely, the tribunal, in *Pey Casado v. Chile*, argued in favor of an interpretation with regard to the object and purpose of the Chilean legislation in the light of its necessary harmonization with IHRL. The tribunal, in *Philip Morris v. Uruguay*, supported that the IIA must be interpreted in accordance with Article 31 (3) (c) of the VCLT requiring the treaty provisions to be interpreted in the light of any relevant rules of international law, disagreeing with the Claimant's view that the lack of any provision in the applicable BIT providing for exceptions for public health weakened the host State defense.

Then, the tribunal's analysis, in *Al Tamini v. Oman*, was a 'deviation from the norm" due to the existence of an explicit environmental provision in the FTA: the tribunal inserted environmental arguments by resource to article 31 (1) and (2) of the VCLT and treaty interpretation in the context and purpose of the free trade agreement (FTA) as a whole, considering the environmental provisions in the FTA. This case indicates the significance of incorporation of explicit human rights-based provisions into the IIA itself and the change that

this development could bring towards equity of weapons in investor-state arbitration that could enhance the protection of the rights of the host State population and promote social justice.

On the other hand, the arbitral tribunals have consistently denied subject matter jurisdiction over investors' independent human rights claims. Nonetheless, the tribunal's interpretation of the preservation of rights provision in *Roussalis* case leaves space for acceptance of investors' independent human rights claims in the future.[422] Finally, the admission of the host State's environmental counterclaim, in the recent case of *Perenco v. Ecuador*, is a promising indication of the role of counterclaims in rebalancing investment law.[423]

C. The Tribunals' Response to Human Rights Arguments; What Makes a Strong Argument?

This study illustrated that the tribunals provided extensive analysis on IHRL and human rights courts jurisprudence, when the parties paid a great deal of attention to the relevance of IHRL and human rights bodies jurisprudence. Indeed, in *The Rompetrol Group v. Romania*, where both parties considered that the ECHR should be taken into account as relevant material for the treaty interpretation, according to article 31 (3) (c) of the VCLT, and provided arguments based on ECtHR jurisprudence, parties' arguments were followed by an extensive analysis by the tribunal. In *Pey Casado v. Chile*, where the Claimants made references to ECtHR jurisprudence to support their claims, the tribunal also referred to ECtHR jurisprudence to amplify its position. Similarly, in *Al Warraq v. Indonesia*, the Claimant cited extensively human rights bodies' jurisprudence, and the tribunal analyzed respectively the relevant to investors' claims IHRL provisions, in its decision. The tribunals' response further proves the interrelationship between the two regimes: arbitral tribunals "are induced to appeal to other systems, such as human rights, since it is not possible to determine the content of rights as expropriation or fair and equitable treatment by reference only to the provisions of the bilateral treaty".[424]

Moreover, the cases presented indicated that the tribunals are more willing to respond to parties' positions, when those are "fully argued". Instead, the tribunals seemed reluctant to take a stand with regard to the relevance of IHRL, when human rights-based cases were not

[422] Henin (2013), at pp. 269-270.
[423] Bjorklund (2013).

[424] Castillo (2012), at p. 67.

"fully argued" (see, for instance, the tribunal's comment in the case of *Azurix v. Argentina*). This outcome agrees with Alvarez's view that the tribunals are not likely to reach for such contentions on their own, and it largely depends upon the disputing parties to introduce human rights argumentation in support of the above broad reading of the VCLT rule.[425]

Then, another conclusion, deriving from the cases studied, is that a strong human rights argument depends on the evidence that come with it. Indeed, the tribunals appeared to take serious account of the experts' reports, submitted by the parties. In the case of *Pac Rim v. Ecuador*, the tribunal took into strong consideration the expert's opinion on the risks posed by extractive industries on the enjoyment of the host State population's human rights. In the same vein, the tribunals seemed to take into consideration the *amicus curiae* submissions, when the *amici* could essentially inform the case with well-founded IHRL argumentation and expertise. Indeed, in the case of *Biwater v. Tanzania*, where *amicus* briefs were submitted by the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD), the tribunal found the *amici*'s observations useful and informative and stated that, where relevant, specific points arising from the *amici*'s submissions were returned to in that context.[426] Moreover, the tribunal, in *Perenco v. Ecuador*, appointed, on its own initiative, an independent expert to investigate the extent of actual environmental damage claimed by the host State, in its environmental counterclaim. The above cases indicate that the tribunals seek evidence and independent expertise.

Furthermore, it has been illustrated that tribunals are interested in the overall picture of the parties' behaviour, when evaluating their human rights arguments. Thus, the tribunals look into the investor's misconduct or bad faith (see the tribunal's comments in *Peter Allard v. Barbados* for investor's disregard of environmental procedures, and the dismissal of investor's claim in *Al Warraq v. Indonesia*), as well as into the host State's genuine (or not) effort to protect human rights (see the case of *Philip Morris v. Uruguay*, where the tribunal recognized Uruguay's efforts made towards the proper implementation of its obligations under the FCTC, emphasizing that "Uruguay is a country with limited technical and economic resources").

Sometimes, the tribunals took initiatives, when assessing the parties' human rights arguments. Indeed, in *Pey Casado v. Chile*, the considerations over the relevance of the right

[425] Alvarez (2011), at p. 467.

[426] By contrast, see the case of *Border Timers Ltd v. Zimbabwe*, where the tribunal rejected the *amicus curiae* submission, *inter alia*, for lack of independence. European Center for Constitutional and Human Rights (ECCHR) (July 2012). Human Rights Inapplicable in International Investment Arbitration? A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal, at p. 7.

to a nationality under the InterAmerican Convention on Human Rights (IACHR), when deciding the tribunal's jurisdiction, were provided by the tribunal. In *Al Tamini v. Oman*, it was the tribunal that argued in favor of the interpretation of the FTA in accordance with Article 31 (1) and (2) of the VCLT.

Finally, the analysis of the cases highlighted a number of elements that can affect human rights arguments in investor-state arbitration: the different response to human rights argumentation based on binding and non binding human rights instruments (see the tribunal's relevant comment in *Al Warraq v. Indonesia*, with regard to the different nature of the ICCPR and the UDHR); the issue of different treatment of human rights arguments brought by individuals in relation to human rights arguments brought by corporate entities (see the tribunal's comment in the case of *The Rompetrol Group v. Romania*); the fact that IHRL protection may depend on regional human rights systems (see Chapter 2.3. regarding the right to a nationality: while this human right is protected under the IACHR, the ECHR does not recognize independently a right to a nationality); the issue of the existence of parallel proceedings before investment arbitral tribunals and human rights courts (see the *AMTO v. Ukraine* and the *Yukos v. Russia cases*).

EPILOGUE

The position of the present paper is that the role of international human rights law in investor-state arbitration is significant for both the investors and the host States. Developments under IHRL could inform the content of IIAs standards and reinforce host State defenses, as long as the States are willing to invoke their international human rights obligations. The IHRL, in circumstances, not only can inform the vaguely worded standards and indeterminate rights provided under an IIA, but also fill a gap in the international investment regime (consider the need to appeal to IHRL, when nationality remains a threshold criterion for investors' protection). Thus, investors can strengthen even more their claims when they equip them with human rights argumentation. On the other hand, recognizing that investment protections under the IIAs echo human rights, safeguarding investors' rights, the incorporation of explicit human rights and environmental provisions into the IIAs, and the drafting of IIAs to permit closely related host States' counterclaims would help to rebalance investment law and promote equity of weapons in investor-state arbitration. Moreover, the links between human rights and the environment provide States with new legal tools that are necessary to address the dangers that investments pose to the host State population. In the same vein, this study observes that the doctrine of clean hands as well as the invocation of investor's obligation to due diligence, when assessing its legitimate expectations, can reinforce the host State's human rights-based defense. Ultimately, the present paper insists that there shouldn't be space for pre-textual invocation of human rights arguments by the parties.

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